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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ARTHUR TATE, JR., WARDEN,
Petitioner,
vs.
JOHN GLENN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I.

WHETHER THE RECENTLY ENACTED AMENDMENTS TO 28 U.S.C. SECTION 2254 IN THE 1996 ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT REQUIRE THE REVERSAL OR REMAND OF A DECISION VACATING A DEATH PENALTY SENTENCE ENTERED PRIOR TO THE EFFECTIVE DATE OF THE ACT BUT STILL PENDING ON APPEAL IN THE FEDERAL COURT SYSTEM.

II.

WHETHER THE "PREJUDICE" PRONG OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), FOR DETERMINING EFFECTIVENESS OF COUNSEL, IS MET BY THE POST-TRIAL TESTIMONY OF NEWLY HIRED EXPERT WITNESSES WHO CLAIMED THAT COUNSEL COULD HAVE PRESENTED AN ORGANIC BRAIN DAMAGE MITIGATION DEFENSE AT TRIAL, THUS REQUIRING THE VACATION OF A SENTENCE OF DEATH.

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OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing was entered on February 26, 1996 and is unreported. *John Glenn v. Arthur Tate, Jr., Warden*, Case No. 93-3568. (A142).[1] The decision of the Court of Appeals for the Sixth Circuit, entered on December 21, 1995, is reported. *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1996). (A1). The amended order and judgment of the United States District Court for the Northern District of Ohio, entered on April 28, 1993, is unreported. The District Court's initial order, entered on April 8, 1993, also is unreported. *John Glenn v. Arthur Tate, Jr.*, Case No. 5:91CV2047. (A23 and A41). The judgment of the Supreme Court of Ohio denying respondent's postconviction relief motion, which was entered on February 20, 1991, is unreported. *State of Ohio v. John Glenn*, Case No. 90-2231. (A144). The judgment of the Ohio Court of Appeals upon reconsideration of its postconviction action, which was entered on December 11, 1990, is unreported. *State of Ohio v. John Glenn*, Case No. 89-P-2090. (A145). The initial opinion of the Court of Appeals of Ohio denying respondent's postconviction relief motion, which was entered on September 24, 1990, also is unreported. *State of Ohio v. John Glenn*, Case No. 89-P-2090. (A151). The opinion of the Ohio Court of Common Pleas, on postconviction, entered June 21, 1989, is unreported. *State of Ohio v. John Glenn*, Case No. 82-CR-0072. (A188).

JURISDICTIONAL STATEMENT

On February 26, 1996, the United States Court of Appeals for the Sixth Circuit denied the State's petition for

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[1] Page references are to the Appendix, which was filed in a separate volume due to its size.

rehearing. Jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions at issue are the Assistance of Counsel Clause of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.") and the Fourteenth Amendment ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

STATEMENT OF THE CASE

Fourteen years after respondent John Glenn was convicted of killing a deputy sheriff and sentenced to death for doing so, a divided panel of the United States Court of Appeals for the Sixth Circuit reversed his capital sentence. The majority claimed that Mr. Glenn's trial counsel should have presented mitigating evidence that Glenn suffered from organic brain disorder. The dissent disagreed. Like the myriad state courts that had considered the issue and the district court below, Judge Siler found that this strategic decision did not constitute ineffective assistance and in all events would have had little likelihood of altering Glenn's sentence.

This dispute stems from Mr. Glenn's now-unchallenged decision to murder a deputy sheriff in broad daylight on October 22, 1981 in Youngstown, Ohio. For that act, a duly-empaneled jury found Glenn guilty of one count of aggravated murder with a specification that the

victim was a peace officer and one count of escape. He was sentenced to death for aggravated murder and to a consecutive term of two to five years for escape. The Ohio courts reviewed and affirmed his conviction on direct appeal.

Glenn sought postconviction review of his case in the Ohio courts, alleging among other things that his trial counsel were ineffective because they failed to present evidence of organic brain damage at the mitigation hearing following his criminal trial. On June 21, 1989, after an extensive hearing, the Court of Common Pleas of Portage County denied the petition, finding:

> It is therefore the conclusion of this judge that at the mitigation hearing and trial John Glenn was adequately represented by Counsel, that he received good representation and a fair trial ***.

(A189). Glenn then raised the issue of denial of effective counsel, among others, on appeal. On September 24, 1990, the court of appeals affirmed, finding that no substantial prejudice resulted from counsels' performance at the mitigation hearing:

> [W]e cannot find that the trial court abused its discretion in overruling the post-conviction relief proceeding, as it does not appear that but for counsel's failure, the results would have been different, with the jury concluding that the aggravating facts outweighed the mitigating circumstances.

(A186). The Ohio Supreme Court affirmed without opinion on February 20, 1991. (A144).

On October 10, 1991, Glenn petitioned for a writ of habeas corpus under 28 U.S.C §2254 in the United States District Court for the Northern District of Ohio, Eastern Division. In his petition, he raised 27 grounds for relief, including denial of effective counsel at the mitigation phase. On April 8, 1993, the district court denied the petition, again finding no prejudice arising from the ineffective assistance claim:

> In sum, the court concludes that if the petitioner's trial counsel had produced the additional evidence as presented during the post conviction evidentiary hearing there is not a reasonable probability that a different sentence recommendation would have been forthcoming from the jury.

(A103). On April 28, 1993, the district court granted in part Glenn's motion to alter and amend judgment regarding factual corrections, then again denied the habeas corpus petition. (A23).

On December 21, 1995, the United States Court of Appeals for the Sixth Circuit affirmed Glenn's conviction, but by a 2-1 vote reversed his capital sentence. The majority found that Glenn's trial counsel had been prejudicially ineffective during the penalty phase of the state criminal trial. (A-1, A5-A17). More specifically, it determined that trial counsel should have presented, but did not, a mitigation defense of organic brain damage. Alleged support for this theory came from expert witnesses who asserted this defense may have been available at trial if counsel had administered further tests to Glenn or done additional investigation about his background. Judge Siler, in dissent, stated:

> Certainly, in hindsight, one can find experts and

> other witnesses who might have helped Glenn. Whether they could have helped him any better than the ones that were available is pure speculation.
>
> * * *
>
> It does not appear to me that there were any material factors that were not introduced, except through experts who had been found after the trial who would have testified favorably for the defense.

(A18, A22). On February 26, 1996, the court denied the State's Petition for Rehearing and Rehearing En Banc. (A142).[2]

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[2] Under Ohio law Glenn cannot be resentenced to death at a new mitigation hearing. *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIES TO PENDING CASES.

A. THE AMENDMENTS TO 28 U.S.C. §2254 APPLY TO THE INSTANT CASE.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996, S. 735, was signed into law by President Clinton. Among other things, the Act amended 28 U.S.C. §2254, increasing the amount of deference that federal courts must give to state court rulings on matters of federal law in reviewing habeas petitions. Because this case was pending when the Act became effective and because the Act makes procedural and not substantive changes to existing law, this habeas petition should be assessed under the new standards set forth in the Act.

"Even absent specific legislative authorization," this Court has held that "application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 1501 (1994). In *Landgraf*, the Court distinguished between retroactive application of statutes that affect substantive rights and those that merely affect procedural or jurisdictional rights. *Id.* at 1501-1505. The former category of statutes, *Landgraf* held, may not be applied to pending cases absent express statutory authorization; but the latter category of statutes does apply to pending cases even when there is congressional silence on the

point. *Id.* at 1502 & 1502 n.28.

The Act's amendments to section 2254 plainly do not impair substantive rights -- be they the right not to be exposed to increased liability for past conduct or the right not to have a new duty imposed that did not exist when the criminal act was committed. *See id.* at 1501-1505. Far from affecting the appropriate standards for assessing Glenn's past conduct, the amendments merely make procedural changes in the way ineffective assistance and other federal claims are handled in post-conviction habeas cases reviewing state court convictions. Nothing in the Act remotely affects Glenn's pre-existing duties not to commit murder or the standards for assessing guilt on such a charge. The amendments simply alter the way federal courts review state convictions in habeas cases. Indeed, in at least one prior instance, this Court has applied new legislation in assessing a habeas petition. *See Ex Parte McCardle*, 74 U.S. 506 (1868) (Congress repealed the Court's authority to entertain certain habeas cases and the Court applied the new law in dismissing a pending habeas petition).

In short, application of *Landgraf* makes clear that the Act does -- and should -- apply to Glenn's habeas petition. While the amendments to 28 U.S.C. §2254 are silent on whether they apply retroactively, the instant case was pending when the Act became effective. And, because the amendments affect procedural (not substantive) rights, they should be applied to all pending cases -- including this one.

B. THE AMENDMENTS TO 28 U.S.C. §2254 ALTER THE APPROPRIATE STANDARD OF REVIEW FOR THIS CASE.

In applying the ineffectiveness-of-counsel test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the state

courts all concluded that Glenn had failed to establish prejudice in his sentencing from any alleged ineffective assistance by his trial counsel. On federal habeas, the district court reached the same conclusion.

In disagreeing with each of these conclusions, the Sixth Circuit applied a *de novo* standard of review:

> Like the state court of appeals the federal district court rested its disposition of the ineffective assistance question solely on the "prejudice" branch of the *Strickland* inquiry ***. We must review the entire question *de novo*, *see Strickland*, 466 U.S. at 698, and *Smith v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) . . . .

(A5).

The amendments to 28 U.S.C. §2254 alter this standard of review. In particular, they require federal courts to give increased deference to state court rulings on questions of federal law and mixed questions of federal law and fact. Subsection (d) of Section 2254 now reads as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Properly recognizing the competency of state courts to apply clearly established decisions of this Court, the amendments establish that federal courts cannot upset state court rulings unless they are "unreasonable."

The presumption of correctness created by the amendments to 28 U.S.C. §2254 cannot be overcome in this instance. The state court of common pleas held a full hearing on postconviction review concerning Glenn's ineffective-assistance claim, and its written decision (A187-A188) was affirmed by the state court of appeals in its initial decision (A154, A155-A158, A178-A185) and upon rehearing (A144, A148). At each stage, the Ohio courts reasonably applied the *Strickland* standard. Under these circumstances, the decisions of the state courts should be respected by federal courts confronted with section 2254 habeas petitions. Because they were not, the decision below should be reversed.

C. CERTIORARI SHOULD BE GRANTED, TO RESOLVE TWO ISSUES OF NATIONAL IMPORTANCE -- THE APPLICABILITY OF THE AMENDMENTS TO 28 USC §2254 TO PENDING CASES AND ALTERATION OF THE *STRICKLAND* STANDARD IN LIGHT OF SUCH AMENDMENTS.

This case offers a vehicle to address two issues of national importance arising from the amendments to 28 USC §2254. First, the case raises the question whether the new amendments apply to hundreds (if not thousands) of habeas

petitions pending when the 1996 Act became effective. Second, the case implicates the proper application of the amendments to *Strickland* claims, a question raised in virtually everyone of these pending habeas petitions, and one that past being precedent surely will be raised in most future petitions.

II.

IN THE ALTERNATIVE, CERTIORARI SHOULD BE GRANTED TO ESTABLISH THAT THE *STRICKLAND* SUBSTANTIAL PREJUDICE PRONG IS NOT VIOLATED BY CLAIMS THAT EVIDENCE OF ALLEGED BRAIN DAMAGE IS MORE MITIGATING THAN EVIDENCE OF SERIOUS RETARDATION.

A. THE DECISION OF THE COURT BELOW THREATENS THE DEATH PENALTY MITIGATION PROCESS.

After fourteen years of litigation, after thorough review by the state courts and the federal district court, the Sixth Circuit determined that Mr. Glenn did not receive effective assistance of counsel during the mitigation phase of his sentencing proceeding. Distilled to its essence, the appellate court held that Glenn was substantially prejudiced by his trial counsel because they introduced psychiatric evidence to the effect that he was mentally retarded but did not introduce evidence adduced by later psychiatrists that Glenn *might have* suffered brain damage. Conspicuously missing from the court's opinion is any explanation "how the evidence of brain damage," in the words of dissenting Judge Siler, "is more mitigating that the fact that Glenn was retarded." (A20-21). No such line can be drawn. Nor should such manipulable distinctions be permitted to go unchecked.

During the mitigation phase of Glenn's sentencing hearing, Ohio law required the jury to weigh several mitigating factors. It had to weigh against the aggravating circumstances of the crime "the history, character and background of the offender," O.R.C. §2929.04(B), and determine whether "because of a mental disease or defect" the offender "lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law," O.R.C. §2929.04(B)(3), as well as consider "any other factors that are relevant to the issue of whether the offender should be put to death," O.R.C. §2929.04 (B)(7). (A6).

During this proceeding, Glenn's trial counsel sought and obtained the appointment of medical experts. Two doctors were appointed at state expense. The trial court appointed Dr. Ramani, a psychiatrist, and Dr. Siddall, a psychologist, to evaluate Glenn's mental capacity on behalf of the court. Dr. Siddall concluded that "the offense was not the product of psychosis, mental retardation, organic brain disease, other mental illness, lack of education, unusual emotional pressure, or inadequate coping skills on the part of Mr. Glenn." (A13). Dr. Ramani agreed that Glenn was "somewhat retarded." (A13 n.4). But he concluded that his retardation "doesn't appear to be severe enough to impair his judgment or his capacity." (A13 n.4).

After direct appeals were concluded, Mr. Glenn presented the testimony of new experts during his state post-conviction hearings. Dr. Tanley testified that Glenn had brain damage and speculated, but did not opine, that it might have resulted from a surgical operation performed on Glenn's mother under general anesthesia early in her pregnancy. (A10). Dr. Tanley and other newly hired experts then testified that it was "extremely unlikely" that Glenn was

capable of developing the plan to release his brother from custody, thus bolstering the contention that his brother was the mastermind of the escape plan. (A10). Based principally on this testimony, the Sixth Circuit majority (though no other state or federal courts) found prejudice in the mitigation process.

The majority made three speculative assumptions about the impact of this testimony on the prejudice prong of *Strickland*, not one of which supports the result it reached. First, the court appeared to assume that Drs. Siddall and Ramani would have testified differently if the information provided by Dr. Tanley and the other new experts had been available to them. No evidence supports this conclusion, however, except the suggestions of Glenn's own experts.

Second, the court speculated that, had the mitigation experts testified differently or had defense counsel obtained Dr. Tanley, the result would have been different. But, as the district court noted, there was substantial evidence to the contrary:

> In this case the crime was not spontaneous. It was not the result of a sudden unexpected confrontation. Rather, it was the product of a well thought out plan to bring about the successful escape of his brother from the custody of the sheriff.
>
> * * *
>
> In sum, the court concludes that if the petitioner's trial counsel had produced the additional evidence as presented during the post conviction evidentiary hearing there is not a reasonable probability that a different sentence

> recommendation would have been forthcoming from the jury.

(A102-A103).

Third, the court assumed that there was a meaningful distinction for prejudice purposes between psychiatric testimony that was introduced and psychiatric testimony that could have been introduced. The difference between the two, however, was far from clear. Two key pieces of evidence on this point were admitted: (1) Glenn was mentally retarded at the time of the murder; and (2) Glenn had a low IQ of 73-75 during the criminal prosecutions and appeals. What was not admitted, and allegedly should have been, was the following: (1) Some of Glenn's grade school IQ tests revealed scores in the 60's and one test at age 13 revealed an IQ of 56; (2) evidence of organic brain damage; and (3) evidence that brain damage "might well have" resulted from a surgical procedure given to Glenn's mother during her pregnancy.

The key point from the Sixth Circuit's perspective was the difference between being mentally retarded and having organic brain damage. But no medical (or other) evidence indicates that this is a tenable or even meaningful distinction in the context of a mitigation hearing for premeditated murder. The distinction then should not be used to sustain the reversal of an otherwise-proper capital sentence.

B. OTHER CIRCUIT COURTS HAVE REFUSED TO PERMIT CAPITAL DEFENDANTS TO HAVE TWO BITES AT THE MITIGATION APPLE.

As an initial matter, the decisions relied on by the

Sixth Circuit do not support this result.[3] Nor do decisions by other courts. On the contrary, they have been careful to prevent after-the-fact second guessing of mitigation hearings based on new psychiatric evidence.

Doyle v. Dugger, 922 F.2d 646 (11th Cir.), *cert denied*, *Doyle v. State*, 502 U.S. 926 (1991), like this case, involved a capital habeas petitioner who argued that his counsel's mitigation performance was ineffective because he "did not focus on *** [his] extreme emotional disturbance and substantial impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." *Id.* at 651-652. But the Eleventh Circuit properly found that evidence as to the petitioner's mental and emotional problems had been presented on mitigation. The court also found that "the testimony of another mental health expert," presented during the state collateral relief hearing, would not suffice to overturn the sentence, *id.* at 652 n.4, because trial counsel had "adduced testimony before the sentencing jury that communicated to

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[3] The cited cases all related to the performance prong of *Strickland*. *See, e.g.*, *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), *cert denied*, 488 U.S. 872 (1988) (criticizing counsel for only putting on testimony about the defendant's mental condition through the defendant's own mother; *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir.), *cert denied*, 504 U.S. 943 (1992) (criticizing defense counsel for presenting no mitigating evidence at all during the penalty phase of the trial); *Loyd v. Whitley*, 977 F.2d 149 (5th Cir.), *cert denied*, 508 U.S. 911 (1993) (finding that defense counsel were not generally competent to handle a death case, that they had knowledge of defendant's mental problem yet did not investigate further the appointment of an independent psychiatric expert (which state law provided for), and that they misunderstood the difference between the McNaughten test for sanity and the Louisiana statutory mitigating circumstances of mental disease or defect).

the jury substantially the same evidence that collateral counsel asserts should have been adduced." *Id.* at 652.

Other cases are to the same effect. *See, e.g., Clisby v. Jones*, 960 F.2d 925, 930 n.8 (11th Cir. 1992); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991) ("we would be reluctant to open up this type of *Ake* claim to a battle of the experts in a "competence" review. Every aspect of a criminal case which involves the testimony of experts could conceivably be subject to such a review -- a never ending process. *** The ultimate result would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis."); *Harris v. Vasquez*, 913 F.2d 606, 620 n.14 (1990) ("Harris cannot now obtain a 'second bite at the apple' because he believes a new group of psychiatrists would offer a different defense than the psychiatrists originally chosen by Ryan, or that because the defense of remorse did not work with the jury the first time, a battle of experts might work at another trial.").

No empirical evidence is needed to establish that the post-trial litigation strategy, thus far successfully employed by Glenn, is ripe for use in other pending and future cases. This Court should grant certiorari to give guidance to the lower courts about when later-presented psychiatric evidence can establish "prejudice" under the *Strickland* test. At a minimum, capital defendants should be required to show not just a new diagnosis, but should be forced to demonstrate that substantial prejudice flowed from the introduction of one form of mitigating psychiatric evidence over another. Here, the Sixth Circuit mistakenly focused on the evidence that was not introduced while failing fully to consider the impact of evidence that was introduced. At best, there was a marginal difference between the two; at worst, they were virtually one and the same.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, or in the alternative grant certiorari and remand the case for reconsideration in light of the recent amendments to 28 U.S.C. §2254.

Respectfully submitted,

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Petitioner,
vs.
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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S APPENDIX

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No. 93-3568

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN GLENN,	:	
	:	
Petitioner-Appellant,	:	
	:	ON APPEAL from
v.	:	the United States
	:	District Court for
ARTHUR TATE, JR., WARDEN	:	the Northern District
	:	of Ohio
Respondent-Appellee.	:	

Decided and Filed December 21, 1995

Before: GUY, NELSON, and SILER, Circuit Judges.

NELSON, J., delivered the opinion of the court, in which GUY, J., joined. SILER, J. (Pp. 17-21), delivered a separate opinion concurring in part and dissenting in part.

DAVID A. NELSON, Circuit Judge. This is an appeal from the denial of a writ of habeas corpus sought by an Ohio prisoner who is under a sentence of death, imposed on the recommendation of a jury, for aggravated murder. The petitioner contends, among other things, that he failed to receive effective assistance of counsel, to his prejudice, at the sentencing phase of his trial.

Under Ohio law, the defendant in a murder case that is tried to a jury cannot be sentenced to death unless the jury finds, beyond a reasonable doubt, that the aggravating circumstance - here the fact that the victim was a peace officer - outweighs any mitigating circumstances. Perhaps the most significant of the potentially mitigating circumstances in this case was the fact that, according to evidence elicited after sentence had been imposed, the petitioner -- a young man who had been classified in school as mentally retarded, who was apparently acting at the instigation of an older brother, and who was highly susceptible to suggestion by people he admired -- suffered from global brain damage sustained before he was born. Expert testimony that the petitioner's brain function was organically impaired would have been readily available if the petitioner's lawyers had sought it. They failed to do so - and they compounded this error by a series of mistakes which, among other things, led to the jury being presented with uncontradicted expert evidence that the offense was *not* the product of mental retardation or organic brain disease.

So serious were the lawyers' mistakes, in our view, that the lawyers were not functioning as the "counsel" to which the accused was entitled under the Sixth Amendment. And because of the lack of adequate representation, the result reached in the sentencing proceeding was simply not reliable. While affirming the denial of habeas relief insofar as the petitioner's murder conviction is concerned, we shall direct that the writ of habeas corpus be granted unless the petitioner is resentenced.

I.

Although the petitioner, John Glenn, has consistently maintained his innocence, the prosecution presented strong evidence that it was he who shot and killed a part-time deputy sheriff, John Litch, Jr., in October of 1981. The shooting occurred during an attempt to free Robert Glenn, an

older brother of John Glenn, from the deputy's custody.

Robert Glenn, an inmate at the Mahoning County jail in Youngstown, Ohio, was periodically taken to a local hospital for treatment of a broken leg. He apparently devised a plan for an escape to be staged en route to the hospital, and he got John Glenn to help him carry the plan out. (Robert was later tried and convicted on charges of escape and involuntary manslaughter, and the evidence presented at his trial was characterized by the prosecution as showing that it was Robert Glenn who planned the escape; "his signature is all over this escape plan," the prosecution argued in Robert Glenn's case.)

Deputy Sheriff Litch drew the assignment of driving Robert to the hospital on the day in question. Before the trip was completed, the evidence showed, a turquoise and black car struck the deputy's vehicle from the rear at a busy intersection. When the deputy got out of his cruiser and approached the driver of the other car, the latter shot him at point-blank range with a sawed-off shotgun. The victim died almost immediately.

Robert Glenn and the other man fled the scene in the car. John Glenn was arrested a few hours later at the home of his girlfriend, Alseen Lanier. Ms. Lanier testified at trial that John told her he had killed a police officer and that she should keep this a secret.

At approximately the same time as the shooting, Otis Simmons, an acquaintance of John Glenn, was stopped by a police officer for reasons unrelated to the homicide. While Simmons was in the officer's cruiser, a call came over the radio about the shooting of Deputy Litch. Simmons then told the officer that earlier in the day John Glenn had told him he was going to "escape" his brother Robert.

The crime occurred three days after the effective date of the 1981 legislation that cured constitutional defects in Ohio's death penalty law. See Ohio Rev. Code §§2929.02 *et seq.* A Mahoning County grand jury indicted John Glenn, who was 19 years old at the time, for aggravated murder. The indictment specified that the victim of the offense was a peace officer engaged in his duties. The charge was one for which the death penalty could be imposed under Ohio Rev. Code §§2929.03 and 2929.04(A)(6).

Publicity about the case was so extensive in the Youngstown area that the Mahoning County Common Pleas Court was unable to seat a jury after twenty-three days of voir dire. Mr. Glenn's appointed trial counsel moved for a change of venue, and the case was sent to nearby Portage County for trial.

Both Ms. Lanier and Mr. Simmons testified at the trial. In addition to their highly incriminating testimony, the prosecution introduced a chemical test which revealed that John Glenn had significant amounts of barium on his hands, consistent with the recent use of a weapon. There was evidence that Robert Glenn's mother had a turquoise and black car that had been driven by John Glenn on the morning of the murder. Plaster scrapings found in the car matched the plaster of Robert Glenn's leg case.

The jury found Glenn guilty as charged. A few days later, after a relatively brief evidentiary hearing on the sentence, the jury recommended imposition of the death penalty. The trial court accepted the recommendation.

After exhausting his state remedies on direct appeal and in post-conviction proceedings, Glenn petitioned the United States District Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The district court denied the petition, and

this appeal followed.

II.

The appellant's strongest argument is that he failed to receive effective assistance of counsel during the penalty phase of his trial. To obtain relief on such a ground, he must show both that his counsel's performance "fell below an objective standard of reasonableness" and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

The state court of appeals to which Glenn appealed from the trial court's denial of post-conviction relief concluded that the performance of Glenn's counsel was not objectively reasonable. The denial of relief was nonetheless upheld on the theory that Glenn could not demonstrate prejudice. An appeal from this decision was dismissed without opinion by the Supreme Court of Ohio.

Like the state court of appeals, the federal district court rested its disposition of the ineffective assistance question solely on the "prejudice" branch of the *Strickland* inquiry; the district court pretermitted the issue of whether the lawyer's performance could pass constitutional muster. We must review the entire question *de novo*, see *Strickland*, 466 U.S. at 698, and *Smith v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992), and respect for our state and federal colleagues who have already examined the question prompts us to pay particularly close attention to the prejudice aspect.

Under Ohio's death penalty statute, the trial jury was required to weigh against the aggravating circumstances of the crime "the history, character, and background of the offender," among other things. Ohio Rev. Code §2929.04(B). The jury was also required to consider whether, "because of a mental disease or defect," the

offender "lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Ohio Rev. Code §2929.04(B)(3). And the jury was required to consider "[a]ny other factors that are relevant to the issue of whether the offender should be put to death." Ohio Rev. Code §2929.04(B)(7). The jury could consider none of these matters, of course, if the relevant facts were not placed before it.

Here the jury was given virtually no information on John Glenn's history, character, background and organic brain damage - at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death. It was not that such information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons. The information was not presented to the jury because counsel never took the time to develop it.[1]

Although both of Glenn's court-appointed lawyers were experienced criminal defense attorneys, and although they had some eight months to get ready for sentencing proceedings necessitated by a verdict that could hardly have come as a surprise to them, evidence presented to the state trial court at a post-sentence hearing showed that the lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty. It was obvious, or should have been, that the sentencing phase was likely to be "the stage of the proceedings where counsel can do his or her client the most good," *Kubat v.*

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[1]See *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991), *cert. denied*, 503 U.S. 592 (1992), where the court "reject[ed] the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."

Thieret, 867 F.2d 351, 369 (7th Cir.), *cert denied*, 493 U.S. 874 (1989) -- yet Glenn's counsel failed to make any significant preparations for the sentencing phase until after the conclusion of the guilt phase. This inaction was objectively unreasonable. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991), *cert. denied*, 504 U.S. 943 (1992).

Only one of Glenn's lawyers did any preparatory work at all following the verdict, and his efforts were largely misdirected. He arranged for the preparation of a videotape which, if the members of the jury had been permitted to see it, would have shown them the physical appearance of the neighborhood where Glenn grew up and would have enabled them to hear commentary by a narrator, by John Glenn's mother, and by a trucker for whom Glenn had once worked. The admissibility of such a videotape was obviously questionable, but counsel sought no advance ruling on the issue. When the videotape was sought to be shown to the jury, the trial court held -- properly, in our view, see *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) -- that it was inadmissible hearsay.

Although the jury did not see the videotape, neither John Glenn's mother nor the former employer was called to present live testimony. Aside from the producer-narrator, who testified briefly as to the preparation of the videotape, the only mitigation witnesses the jury heard were a minister and a teacher who had known John Glenn when he was small but had seen nothing of him for years; a minister who did not know him at all but attempted -- without much success, most of the proposed testimony being ruled inadmissible -- to present theological objections to the death penalty; and a

lawyer who expressed the opinion that although John Glenn had a delinquency adjudication and a record that included some arrests and misdemeanor convictions, he did not have a "significant" criminal record. (This testimony pertained to one of the statutory mitigation factors, "[t]he offender's lack of a significant history of prior criminal convictions and delinquency adjudications." Ohio Rev. Code §2929.04(B)(5).)

John Glenn himself made a brief unsworn statement to the jury. The statement, in its entirety, was as follows:

> "I am - I am not guilty. I should not be given the -- I should not be given the death sentence for a crime I did not commit. Thank you."

None of Glenn's relatives testified, although a number of them would have been willing to do so if asked.

The prosecutor told the jury in final argument that "you received little by way of mitigation at the supposed mitigation hearing." This was certainly true; the jury *did* receive very little by way of mitigation evidence at what was supposed to be the mitigation hearing.

The reason for the paucity of mitigation evidence, as we have said, was lack of preparation on the part of Glenn's lawyers. The lawyers made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. They never examined his medical records (including an emergency room record prepared after he collapsed in court one day) of records of mental health counseling they knew he had received. They never talked to his probation officer or examined the probation officer's records. And although they arranged for

tests, some months before the start of the trial, to determine whether he was competent to stand trial, they waited until after he had been found guilty before taking their first step -- or misstep, as we shall explain presently -- toward arranging for expert witnesses who might have presented mitigating evidence on John Glenn's impaired brain function.

If the lawyers had done what they should have done, they would have been in a position to show the jury that John Glenn's family always considered him "slow;" that as early as the first grade he was assigned to a program for "educable mentally-retarded children;" that his school I.Q. tests repeatedly produced scores in the 60s; that a clinical psychological evaluation conducted a month before his 14th birthday reported a full scale I.Q. score of 56, placing him "within the Mental Defective range;" that another psychological evaluation conducted in this time frame described him as "an ineffectual and dependent young man" who "is very anxious and insecure;" that he left school virtually illiterate; that his mother beat him and his siblings regularly; and that he was hyperactive as a child, constantly butting his head against things and rocking his body back and forth when he went to sleep. Expert testimony adduced at the post-sentence hearing indicated that the hyperactivity was caused by a neurological impairment.

Dr. James Tanley, a neuropsychologist who examined John Glenn in connection with the post-sentence proceedings, found that Glenn was of borderline intelligence (Dr. Tanley reported a full scale I.Q. of 73), with evidence of brain damage. "There is no doubt in my mind but that there is something neurologically wrong with his brain," Dr. Tanley testified, "and that is going to have an effect on his behavior."

The brain damage was global in nature, according to Dr.

Tanley, and might well have resulted from a surgical operation performed on Glenn's mother under general anesthesia early in her pregnancy. (Another expert witness who examined the pertinent hospital records also endorsed this hypothesis.)

Dr. Tanley expressed the view that John Glenn did not have the substantial capacity to conform his conduct to the requirements of the law. The doctor also opined that it was "extremely unlikely" that John Glenn himself would have been capable of thinking up the plan to break Robert Glenn free from custody; John's role in the scheme, according to Dr. Tanley, would have been that of a follower, not a leader.

A wealth of evidence was available to show that John Glenn had always been a follower, as opposed to a leader. His probation officer, for example, who supervised him for a period of 10 months when Glenn was 17, testified at the post-sentence hearing that Glenn was not able to keep up with his peers on the street, was "definitely a follower," and "didn't have enough going to be a leader." Concerned about Glenn's inability to say no to his "negative peers," the probation officer once asked him if he would jump off the Mahoning Bridge (a high span over a river bed with more rocks than water) if his friends asked him to. Glenn said he would -- an answer consistent with the probation officer's view that the boy sought and needed attention from his peers. Most of the attention that John Glenn did receive, the probation officer testified, came from his brother Robert.

The jurors, unfortunately for John Glenn, heard none of this. They did not hear that he had been classified in school as mentally retarded. They did not hear of his need for attention, or his susceptibility to the influence of his brother Robert. And they did not hear that he had a neurological impairment which probably stemmed from the general

anesthesia administered to his mother months before he was born.

As we have indicated, however, the jurors were not without expert guidance of a sort. It is important to understand the arrangements under which this guidance was obtained.

Nine days before the sentencing hearing was scheduled to start, John Glenn's counsel asked to trial court for a medical examination of the defendant "pursuant to the provisions of 2929.024 of the Revised Code of Ohio." (Section 2929.024 provides that where experts are reasonably necessary for the proper representation of the defendant at an aggravated murder trial or at the sentencing hearing following such a trial, and the court determines that the defendant is indigent, "the court shall authorized the defendant's counsel to obtain the necessary services" at government expense.[2]) Unable to identify any particular expert whose services he wished to obtain, Glenn's lawyer then asked for the appointment of someone who had not been involved in the earlier competency evaluation. The prosecutor suggested that the defense was asking the court to appoint its own psychologist or psychiatrist under an entirely different procedure, one authorized by Ohio Rev. Code §§2929.03(D)(1) and 2947.06. Defense counsel made the mistake of acquiescing in this suggestion, despite the fact that -- as the trial court pointed out at the time -- the jurors would necessarily receive copies of any court-appointed expert's

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[2]It is clear that the services provided for by §2929.024 are available to the indigent capital defendant "for his own purposes...." *State v. Esparza*, 39 Ohio St.3d 8, 9, 529 N.E.2d 192, 195 (1988). When the expert is retained under §2929.04, the defendant can decide for himself whether he wants to put the expert's findings before the jury.

reports. Under the statute that defense counsel had cited originally, by contrast, the preparation and disposition of any reports would have been within the control of the defense.

Dr. D. V. Ramani, a psychiatrist, and Dr. James W. Siddall, a psychologist, were appointed by the trial court to evaluate John Glenn under Ohio Rev. Code §2947.06, the statute cited by the prosecution. The doctors were briefed by the prosecution, but not by the defense. Defense counsel had no communication with the doctors at all.

Dr. Siddall spoke with John Glenn at the jail and gave him some psychological tests. Dr. Siddall then prepared a report that explained his reasons for believing that Glenn was competent to stand trial -- an issue that had long since been resolved -- and went on to analyze the question of mitigating circumstances largely on the basis on how the crime had been portrayed in documents furnished by the prosecution.[3] The report then concluded with a sentence that seems questionable in several particulars, given what we know now,

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[3]The pertinent passage reads as follows:

> "Regarding the question of mitigating circumstances, it is not possible to determine a great deal from Mr. Glenn's self-report as he vehemently denies being involved. However, the circumstances of this case, as portrayed in the documents of investigation, do suggest that Mr. Glenn knew the victim of the offense was a law enforcement officer engaged in his duties at the time of the offense. Circumstances also suggest that it was his specific purpose to kill this officer, but it seems very doubtful that the victim induced or facilitated the offense. Similarly, there is no suggestion that Mr. Glenn was under unusual duress, coercion, or strong provocation, in fact, the circumstances do suggest that the crime was carefully planned and carried out.

but would not have seemed questionable in light of what the jury knew then: "Psychological evaluation indicates that the offense was not the product of psychosis, mental retardation, organic brain disease, other mental illness, lack of education, unusual emotional pressure, or inadequate coping skills on the part of Mr. Glenn.

Dr. Ramani also saw John Glenn at the jail and prepared a report. Dr. Ramani's examination appears to have been a superficial one,[4] but the reporter's concluding sentence was, from the defense standpoint, simply devastating: "In summary, within reasonable medical certainty, I do not see any imtigating [sic] circumstances in this particualr [sic] individual."

Defense counsel asked the trial court to redact this sentence before sending the report to the jury, but the court refused to do so. This was probably an error on the court's part, in our view. The problem would never have arisen, however, if defense counsel had not settled for court-appointed experts whose reports were going to be given to

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[4] The entire description of the examination reads as follows:

> "On Examination: Patient was well dressed and groomed, reliable, pleasant, cooperative and open. He was in good contact, with no evidence of acute or overt psychosis. He was well oriented X3. His cognitive functions including remote and recent memory were intact. His judgment had been adequate to his life style, to the extent he worked in a body shop and was developing his boxing skills. He is somewhat retarded (Repoted [sic] IQ in 75 percentile), but this doesn't appear to be severe enough to impair his judgment or his capacity to manage his day very well."

the jury willy-nilly, rather than exercising the right to obtain defense experts under Ohio Rev. Code §2929.024, the statute initially cited by counsel.[5]

Not only did the reports of Drs. Ramani and Siddall go into the jury room in unredacted form, they went to the jury without any suggestion at all that some of the conclusions in the reports were open to question. John Glenn had a statutory right to examine the authority of the reports under oath, see Ohio Rev. Code §2947.06, but the doctors were never called to the stand. We can only assume that defense counsel, not having done their homework, were not prepared to interrogate Drs. Ramani and Siddall about the basis for the very damaging conclusions they stated.

Did any of this affect the reliability of the jury's

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[5]The dissent poses the following rhetorical question:

> "Assuming that the court had authorized the appointment of Drs. Ramani and Siddall under §2929.024, and defense counsel did not like the conclusions of the two experts, what were [counsel] to do?"

The answer seems obvious: no competent defense lawyer would have offered in evidence reports as damaging to the defense as these were. But we are not prepared to assume that Drs. Ramani and Siddall would have been the experts retained by the defense under §2929.024 if counsel had done their homework ahead of time and had asked for authorization to hire someone like Dr. Tanley, for example. And defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was full aware of all facts that might be helpful to the defendant.

decision? We think it did. Viewing the total picture, and considering both the nature of the material presented to the jury that should not have been and the nature of the material not presented to the jury that should have been, we cannot have much confidence in the jury's weighing of the factors relevant to the issue of whether John Glenn should be sentenced to death.

Under the *Strickland* test, the petitioner must show a "reasonable probability" that, but for his counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694. The petitioner does not have to show that his counsel's deficient conduct "more likely than not altered the outcome in this case." *Id.* at 693. The "reasonable probability" of which *Strickland* speaks, rather, is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The question, in other words, is whether counsel's errors were serious enough to deprive the petitioner of a proceeding the result of which was "reliable," *id.* at 687 -- "whether counsel's conduct so undermined the proper functioning of the adversarial system that the trial [a term that includes capital sentencing proceedings] cannot be relied on as having produced a just result." *Id.* at 686.

John Glenn's sentencing proceeding can hardly be relied upon as having produced a just result when the jurors were given to understand, in the unchallenged report of Dr. Siddall, that the crime was not the product of mental retardation or organic brain disease.[6] "It is clear that mental

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[6]Dr. Ramani did acknowledge that Glenn was "somewhat retarded," but neither Dr. Ramani nor the jury had seen Glenn's full psychological record -- and the acknowledgment of some degree of mental retardation was vitiated when Dr. Ramani invaded the province of the jury by expressing the "medical" opinion that there were no mitigating circumstances.

retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act." *Penry v. Lynaugh*, 492 U.S. 302, 337 (1989). Judge Easterbrook, concurring in this affirmance of a grant of habeas relief to a retarded petitioner who had apparently suffered brain damage as a result of blows to the head in his youth, has cited empirical evidence suggesting that while juries tend to distrust claims of insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems such as mental retardation. *Brewer v. Aiken*, 935 F.2d 850, 861-62 (7th Cir. 1991) (Easterbrook, J., concurring). The failure of John Glenn's counsel to draw the jury's attention to the organic brain problem here, and to the possibility that it helped turn John Glenn into putty in the hands of his admired older brother, was both objectively unreasonable and prejudicial.

Our sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity. In addition to *Brewer v. Aiken*, see *e.g.*, *Stephens v. Kemp*, 846 F.2d 642, 652-55 (11th Cir.), *cert. denied*, 488 U.S. 872 (1988) ("the resulting prejudice is clear"); *Blanco v. Singletary*, 943 F.2d at 1505 (prejudice requirement "clearly met" by counsel's failure to present evidence of epileptic seizures and organic brain damage); *Loyd v. Whelley*, 977 F.2d 149, 159-60 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2343 (1993) (failure to present mitigating evidence of substantial mental defects "undermines our confidence in the outcome"). We would be badly out of step with the other circuits were we to conclude that there was no prejudice in the case at bar.

Even if were merely had "grave doubt" as to the existence of prejudice, the Supreme Court's recent holding in *O'Neal v. McAninch*, 115 S.Ct. 992 (1995), would require us to reverse the denial of habeas relief here. But it is "unusual" for judges to be in such doubt, *id.* at 994, and that is not the situation in which we find ourselves; under the *Strickland* standard, we think the prejudice in this case is quite clear.

III.

In additional to challenging his sentence, Glenn contends that both the proceedings in which the jury found him guilty and those in which the appellate courts affirmed the conviction were tainted by error of constitutional dimension. He argues that as an African American he was denied his right to trial by a fairly representative jury when venue was changed from Mahoning County, which has a substantial minority population, to Portage County, which does not; that there were multiple errors at trial, the cumulative effect of which was to make the trial fundamentally unfair; and that he was denied effective assistance of counsel on his direct appeals as of right in the Ohio courts. We reject all of these contentions, in part for reasons ably stated by the district court.

The judgment of the district court is AFFIRMED insofar as the denial of habeas relief was predicated upon the conclusion that Glenn's conviction and its affirmance on appeal were not unconstitutional. The judgment is REVERSED insofar as the sentence of death is concerned, and the case is REMANDED with instructions to issue the writ of habeas corpus, subject to the state's imposing a new sentence within a reasonable period of time.

SILER, Circuit Judge, concurring in part and dissenting in part. I concur with Part III of the majority opinion which

affirmed the trial portion of Glenn's conviction, but I respectfully dissent from the majority's conclusion in Part II, that Glenn was denied the effective assistance of counsel in the sentencing phase of his conviction. Therefore, I would affirm the district court's denial of the writ of habeas corpus.

As the majority describes, both the Ohio court of Appeals and the United States District Court found no prejudice from the performance of defense counsel at the sentencing hearing, under the test from *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). However, the majority finds that the paucity of evidence introduced for Glenn in his sentencing trial failed to show certain factors outlined in Ohio Rev. Code §2929.04(B): (1) "the history, character and background of the offender"; (2) whether "the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law"; and (3) "[a]ny other factors that are relevant to the issue of whether [Glenn] should be put to death." I respectfully disagree with that conclusion. Certainly, in hindsight, one can find experts and other witnesses who might have helped Glenn. Whether they could have helped him any better than the ones that were available is pure speculation.

Defense counsel had the videotape prepared for the sentencing phase of the trial. That showed foresight on his part. The majority suggests that counsel should have obtained an advance ruling on its admissibility, but whether the trial court would have made a preliminary ruling is again speculation, as some judges are reluctant to rule prospectively on evidentiary matters. There was at least some argument in favor of the videotape's admissibility, for the Ohio Court of Appeals on direct appeal discussed it and then found the failure to admit it into evidence was harmless

error at best. The Ohio Supreme Court agreed, because, "those particular matters applicable to mitigation which were presented in the videotape were substantially included in the trial testimony of other defense witnesses." *State v. Glenn*, 504 N.E.2d 701, 709 (Ohio 1986), *cert. denied*, 482 U.S. 931 (1987). Therefore, the failure to call Glenn's mother and the employer as witnesses was of little import to the Ohio Supreme Court, as their testimony would have been cumulative.

What was presented for Glenn in the sentencing phase of the trial? The jury had the reports from Drs. Ramani and Siddall, the presentence report, and testimony from a minister, a teacher and a lawyer. They also had the unsworn statement by Glenn.

As the Ohio Supreme Court found, many of the aggravating and mitigating factors in Ohio Rev. Code §2929.04(B) were not pertinent to this case. Of those factors which were pertinent, the jury knew the circumstances of the offense and the history, character and background of Glenn. Even though the information pertained to his earlier life, there was no evidence to suggest any significant changes in his later life. After all, he was only nineteen years old at the time of the offense. The Ohio Supreme Court found that:

> Appellant also introduced evidence as to his poor environment and background. Appellant was raised in an environment of poverty. He received little attention from his natural father. He had been truant and had educational and disciplinary problems as a boy. Appellant had extensive contact with his church when he was younger. He also required special education classes.

Glenn, 504 N.E.2d at 711.

Although the majority is concerned with the fact that defense counsel had not spoken to any of Glenn's brothers and sisters, nor examined his medical records or mental health counseling records, nor talked to his probation officer, nor examined the probation officer's records, it appears that most of the information they would have gamered [sic] from those sources would only have corroborated the information presented to the jury in the reports of Drs. Ramani and Siddall and in the presentence report. The jury had information that Glenn came from a poor environment, was retarded and was in special education classes. Moreover, had counsel called the defendant's mother and siblings, their testimony may have been detrimental to Glenn's case. For instance, Glenn claims that his mother beat him and the siblings regularly, but she probably would not have admitted that in her testimony. Perhaps her children would have testified about the beatings, but the post-conviction decision by the Ohio Court of Appeals indicated that the family members had signed affidavits containing negative information about Glenn.

Dr. Tanley, the neuropsychiatrist who examined Glenn in the post-sentence proceedings, corroborated the I.Q. finding from Ramani's report. Dr. Ramani also reported that Glenn used to hit his head against the wall and was "nervous." The theory expounded by Dr. Tanley and another expert, referred to in the majority opinion, that Glenn's brain damage might have resulted from a surgical procedure performed on Glenn's mother when she was under general anesthesia in her pregnancy seems also to be speculative. There is no physician yet who has stated that it was within reasonable medical certainty that such a surgical procedure on the mother caused any permanent problems to Glenn.

I do not understand how the evidence of brain damage

is more mitigating than the fact that Glenn was retarded. Dr. Siddall concluded that the offense was not the product of retardation or any brain disease or other mental illness. Certainly, Dr. Tanley had a contrary view. The requirements of *Strickland* do not mandate that an attorney search out all potential favorable psychiatrists and psychologists, in order to find the one who would testify best for his clients.

I do not think that it is significant that defense counsel first asked the court for a medical examination of the defendant under Ohio Rev. Code §2929.024, but the experts were later appointed under Ohio Rev. Code 2929.03(D)(1) and 2947.06. Section 2929.024 is a statute providing for expert services for indigents in general and applies to pre-trial, trial and post-trial services. However, §2929.03(D)(1) "applies to all capital defendants, whether indigent or not." *State v. Esparza*, 529 N.E.2d 192, 195 (Ohio 1988), *cert. denied*, 490 U.S. 1012 (1989). Once the defendant chooses to undergo the mental examinations, he risks the jury's knowledge of the conclusions of the experts under §2947.06 in a death case. *Id.* "There is no constitutional infirmity in providing the defendant with such an option." *State v. Buell*, 489 N.E.2d 795, 808 (Ohio 1986). Assuming that the court had authorized the appointment of Drs. Ramani and Siddall under §2929.024, and defense counsel did not like the conclusions of the two experts, what where they to do? Would they ask the court to authorize two others?[7] Or would they have been forced to have put into evidence what the

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[7]The trial court would have likely denied the request. *See Esparza*, 529 N.E.2d at 195 ("Appellant was not entitled to a 'rebuttal' . . . mental examination prepared by a second psychologist or psychiatrist of his own choosing also at state expense.").

experts had said? Had they decided against using the experts opinions at all, and the defendant would have been sentenced to death, we would be in the same position here, with Glenn on appeal asserting ineffective assistance of counsel because appointed counsel at trial failed to introduce into evidence the expert reports of Drs. Ramani and Siddall.

In the record are found two pretrial evaluations from Dr. Harvey Kayne, a clinical psychologist, and Dr. Anil Nalluri, a psychiatrist, concerning a possible insanity defense and Glenn's competency to stand trial. Neither of these reports was presented to the jury in mitigation during the sentencing phase of the trial. Yet they probably could have been introduced by defense counsel, and they would have corroborated the reports of Drs. Ramani and Siddall. Had they been read to the jury in the sentencing phase, present counsel no doubt would have asserted ineffective assistance of counsel, as the reports indicate that Glenn was competent to stand trial and did not suffer from a mental illness, although he had "borderline intellectual functioning."

I find no prejudice here. It does not appear to me that there were any material mitigating factors that were not introduced, except through experts who had been found after the trial who would have testified favorably for the defense. I do not have grave doubt concerning prejudice under *O'Neal v. McAninch*, 115 S.Ct. 992 (1995), so I would affirm.

DOWD, J. Filed: 4/28/93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN GLENN,	:	
Plaintiff,	:	CASE NO. 5:91CV2047
v.	:	
ARTHUR TATE, JR.,	:	JUDGMENT ENTRY
Defendant.	:	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS THEREBY ORDERED, ADJUDGED and DECREED that:

1. The motion to alter or amend the judgment of April 8, 1993 (Docket No. 73) is granted insofar as the factual errors described in § I(A) are acknowledged and corrected.

The statement on page 2 of the April 8, 1993 Memorandum and Opinion which declares:

> Immediately after the shooting, petitioner opened the rear door of the Sheriff's cruiser where Robert was sitting in the back seat, released Robert, and the two fled in petitioner's car.

is stricken and replaced by the following statement:

> Robert Glenn and the petitioner fled the scene in petitioner's car.

The statement on page 4 which declares:

> John Glenn was nineteen years old on the day of the shooting. Evidence produced at trial established that petitioner had been raised in a dysfunctional home. His mother, prone to anger and violence, subjected petitioner and his siblings to routine beatings. The only male figure petitioner was exposed to during his childhood was his stepfather, who introduced the Glenn children to alcohol and marijuana. Petitioner's family was also very poor. The family often went without the basic necessities, such as heat and other utilities.

is corrected by striking the phrase "at trial" and replacing it with the phrase "during the lengthy post conviction hearing."

In all other respects, the motion to alter or amend the judgment of April 8, 1993 is denied.

2. The petitioner's motion for an evidentiary hearing (Docket No. 62) is denied.

3. The petitioner's application for stay of proceedings (Docket No. 63) is denied.

4. The petition for habeas relief is denied and the stay of execution previously granted remains in effect until further order of the Court.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Glenn,	:	
Plaintiff,	:	CASE NO. 5:91CV2047
v.	:	
Arthur Tate, Jr.,	:	MEMORANDUM OPINION
Defendant.	:	

I. THE PETITIONER'S MOTION TO ALTER OR AMEND THE JUDGMENT OF APRIL 8, 1993 DENYING HABEAS RELIEF.

The court published a 102 page opinion accompanied with additional appendices on April 8, 1993 in this capital habeas case. On April 22, 1993 the petitioner filed a 38 page motion to alter or amend the judgment (Docket No. 73).[1]

The court finds that Ground A of the Motion to Alter or Amend is well taken and that the remaining grounds are without merit. The court will discuss the several grounds advanced *in seriatim*.

A. THE COURT'S OPINION CONTAINS FACTUAL ERRORS.

(1) The court's Memorandum Opinion of April 8, 1993 declares on the second page as follows:

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[1]The court devoted considerable time to the resolution of this case. The court presently has the time to respond to the motion and will not await a response from the respondent.

> Immediately after the shooting, petitioner opened the rear door of the Sheriff's cruiser where Robert was sitting in the back seat, released Robert, and the two fled in petitioner's car.

The petitioner accurately points out that there is an absence of testimony in the record to the effect that the petitioner's half brother Robert Glenn was freed from the Sheriff's cruiser by the petitioner. However, the evidence does lend itself to the interpretation that the petitioner and his stepbrother Robert Glenn fled the scene in the petitioner's car. Accordingly, the challenged sentence is stricken from the record and replaced by the following sentence.

> Robert Glenn and the petitioner fled the scene in petitioner's car.

(2) The court's Memorandum Opinion of April 8, 1993 contains on the fourth page the following paragraph:

> John Glenn was nineteen years old on the day of the shooting. Evidence produced at trial established that petitioner had been raised in a dysfunctional home. His mother, prone to anger and violence, subjected petitioner and his siblings to routine beatings. The only male figure petitioner was exposed to during his childhood was his stepfather, who introduced the Glenn children to alcohol and marijuana. Petitioner's family was also very poor. The family often went without the basic necessities, such as heat and other utilities.

Petitioner's counsel is correct in their observation that there was no evidence produced "at trial" as described in the paragraph. Rather, the testimony developed during the lengthy post conviction hearing supports the challenged paragraph. Accordingly, the challenged paragraph is

modified by striking the phrase "at trial" and substituting the phrase "during the lengthy post conviction hearing."

B. THE COURT'S HARMLESS ERROR ANALYSIS FOR THE 7TH AND 15TH GROUNDS FOR RELIEF IS FLAWED.

As for the 15th ground, the court did not indicate that the error was harmless, but that the judge's curative instruction erased the error.

As for the 7th ground for relief, the court declares the error was harmless in light of the nature of the homicide--a cold, calculating decision to kill the law enforcement officer engaged in the task of transporting the petitioner's stepbrother for medical care as a means to perfect the escape of petitioner's stepbrother. In sum, the nature of the homicide, in this court's view, rendered the error in introducing a report which described charged, but unproven criminal conduct, harmless beyond a reasonable doubt.

C. THE COURT INACCURATELY INVOKED UNWARRANTED PROCEDURAL BARS TO THE PETITIONER'S 7TH, 8TH, L0TH [sic] AND 12TH GROUNDS.

The court addressed and ruled upon each of the barred claims on the merits in the event it should be determined that the court erred in finding a procedural bar.

D. THE COURT FAILED TO DISCUSS OR CONSIDER MUCH OF THE MITIGATING EVIDENCE THAT THE PETITIONER INTRODUCED IN POST CONVICTION.

The court read the entire transcript of the post conviction

hearing. The court is unaware of a requirement that it recount all of the testimony it reads and considers. The court addressed at length Ground Number One which challenged the effectiveness of the petitioner's trial counsel during the sentencing phase. The court determined that petitioner had failed to establish the second prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), requirement to establish ineffective assistance of counsel. The court finds that *Strickland* does not require the court to describe in great detail all the evidence presented by the petitioner in support of the proposition that his trial counsel's performance was so deficient as to establish the first prong of the *Strickland* test.

E. THE COURT FAILED TO CONSIDER THE CONSEQUENCES OF THE DENIAL OF INDEPENDENT EXPERT ASSISTANCE AT THE PENALTY PHASE OF THE TRIAL.

The hypothesis for the sixth ground for relief is that the mental evaluations done in the sentencing phase of the case were not even "minimally adequate." Now the petitioner's counsel has changed the thrust of the sixth ground for relief to a "denial of *independent* expert assistance," a claim not heretofore advanced either at the trial level nor during these proceedings.[2]

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[2]As indicated at page 72 of the Court's April 8, 1993 Memorandum Opinion, ORC §2929.03(D)(1) provides that after the guilt phase of the trial has been completed and *upon request of the defendant*, a mental examination is to be made and the report supplied to the jury during the sentencing phase. The claim is now advanced at this late stage that the prosecution was the only agency to supply Doctors Ramani and Siddall with information concerning the petitioner and that therefore such an imbalance of a supply of information about the petitioner constituted a denial of *independent* expert assistance.

F. THE COURT FAILED TO PERMIT THE PETITIONER TO CONDUCT DISCOVERY.[3]

The petitioner first indicated a desire to conduct discovery in support of its substantive claims some fifteen months after the petitioner was filed. The court has not permitted discovery. Initially, the petitioner indicated that it believed the court should rule on the procedural bar issues and then permit discovery if any ground was denied on that basis. The court ruled on the merits of all grounds even though it found a procedural bar for ten of the 27 grounds advanced.

Now, at this late date the petitioner indicates that he wishes discovery on eight grounds, three, twelve, fifteen, sixteen, nineteen, twenty four, twenty five and twenty seven. As to six of the eight grounds, the petitioner seeks discovery by way of deposing the jurors without advancing any authority for the proposition. Nor does the request address the fact that both the Ohio Rules of Evidence and the Federal Rules of Evidence, Rule 606(B) prohibit such an inquiry. As

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[3]At the conclusion of the oral arguments conducted on January 27, 1993, counsel for the petitioner moved for *in camera* proceeding to be conducted out of the presence of counsel for the respondent. The court granted the motion and the transcript of that *in camera* proceeding has been filed with the Clerk under seal. (Docket No. 66).

The court also filed a memorandum opinion under seal. The memorandum opinion under seal addresses and resolves a discovery motion made by petitioner's counsel during the *in camera* proceeding.

to ground three dealing with the possibility that systematic exclusion of blacks took place in either the grand jury setting in Mahoning County where the indictment was returned or in Portage County where the trial was conducted, no argument or good cause is shown why the court should permit this type of discovery at this time. As for ground 24, the petitioner claims that he should now be permitted to question the scientific evidence advanced by the prosecution in support of the indictment without any demonstration that such a discovery expedition is appropriate for the first time during habeas review.[4] In support of this late motion for discovery, the petitioner advances the affidavit of Kenneth Siegesmund, Ph.D., dated April 19, 1993 in which Dr. Siegesmund opines that because the BCI criminalists Jeffrey Lynn and William Wilson failed to testify as to the *levels* of barium, antimony and lead, it is not possible to evaluate the conclusions of Lynn and Wilson with respect to petitioner's handling and firing of a weapon contemporaneous with the homicide. No explanation[5]

II. THE PETITIONER'S JANUARY 27, 1993

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[5]In support of this late motion for discovery, the petitioner advances the affidavit of Kenneth Siegesmund, Ph.D., dated April 19, 1993 in which Dr. Siegesmund opines that because the BCI criminalists Jeffrey Lynn and William Wilson failed to testify as to the *levels* of barium, antimony and lead, it is not possible to evaluate the conclusions of Lynn and Wilson with respect to petitioner's handling and firing of a weapon contemporaneous with the homicide. No explanation is offered by counsel for the petitioner for the delay from the filing of the petition for habeas relief on October 10, 1991 to the presentation of Dr. Siegesmund's April 19, 1993 affidavit.

MOTION FOR AN EVIDENTIARY HEARING AS FURTHER SUPPORTED BY THE APRIL 22, 1993 MOTION TO ALTER OR AMEND THE JUDGMENT.

The motion to alter or amend challenges the court's failure to grant the petitioner an evidentiary hearing to develop the factual basis for his grounds for relief.

In support of ground G to vacate the court's judgment of April 8, 1993, the petitioner contends that he is entitled to an evidentiary hearing. The Court scheduled oral argument for January 27, 1993 and conducted the same. On the day for the argument, counsel for the petitioner filed a motion for an evidentiary hearing. (Docket No. 62). The primary contention for the proposition that the petitioner is entitled to an evidentiary hearing, as advanced in the January 27, 1993 motion, was for the purpose of curing any procedural defaults. However, the court has already indicated that it proceeded to address the ten grounds for which it found a procedural default and decided them on the merits.

The second reason advanced for the evidentiary hearing is less clear. It appears however that the motion for an evidentiary hearing is tied to the discovery that the petitioner now wishes to undertake with the members of the jury to demonstrate that the instructions of the court and other rulings in some fashion denied the petitioner a fair trial and insured his death penalty.

Townsend v. Sain, 372 U.S. 293 (1963) teaches when an evidentiary hearing must be granted, i.e. if:

(1) the merits of the factual dispute were not resolved in the state court; or

(2) the state factual determination is not fairly supported by the record; or

(3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; or

(4) there is a substantial allegation of newly discovered evidence; or

(5) the material facts were not adequately developed at the state court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

The petitioner's motion for an evidentiary hearing, filed on January 27, 1993, some fifteen months after the petition for habeas relief was filed is enlarged by the April 22, 1993 motion to alter or amend the judgment and identifies 16 grounds for which he seeks an evidentiary hearing as follows:

1. Ground 3--Transfer of trial to county with virtually no black population.[6]

2. Ground 4--(Trial judge allowed experts to render

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[6]There is no factual dispute about the fact that the trial was moved to neighboring Portage County with a substantially smaller percentage of blacks in the jury pool because of a smaller percentage of blacks living in Portage County compared to Mahoning County.

opinions on existence or nonexistence of mitigating factors).[7]

3. Ground 5--(Trial court improperly overemphasized the importance of the presentence report and mental evaluation to the Jury).[8]

4. Ground 9--(Trial court's failure to instruct jurors that mercy was a valid sentencing consideration).[9]

5. Ground 10--(Penalty Phase created an unconstitutional presumption in favor of death).[10]

6. Ground 11--(Improper penalty phase instructions

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[7]There is no factual dispute about the content of Dr. Ramani's report and the concluding declaration about mitigating circumstances. See page 67 of the April 8, 1993 opinion.

[8]There is no factual dispute about the content of the trial court's comments to the jury with respect to the pre-sentence reports and the mental evaluations. See page 70-72 of the April 8, 1993 opinion.

[9]There is no factual dispute about the trial court's refusal to submit to the jury, as requested by petitioner's trial counsel, an instruction that "mercy" was a valid sentencing consideration. See pages 76-82 of the April 8, 1993 opinion.

[10]There is no factual dispute about the text of the trial court's instruction during the sentencing phase of the trial. See pages 24-26 of the April 8, 1993 opinion.

on Mitigation Factors)[11]

7. Ground 12--(Jurors use of Dictionary in Penalty Phase Deliberations).[12]

8. Ground 15--(Two state's witnesses testified that petitioner had been in jail before).[13]

9. Ground 16--(The jury was not instructed to find unanimously every element of the Capital Offense).[14]

10. Ground 17--(Definition of reasonable doubt, used in both

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[11]There is no factual dispute about the text of the court's instructions during the sentencing phase as they related to a listing of the statutory mitigating factors. See pages 26-27 of the April 8, 1993 opinion.

[12]There is no factual dispute that the jurors asked for and received a dictionary during the sentencing phase deliberations.

[13]There is no factual dispute that two of the state's witnesses, during cross-examination, indicated that the petitioner had been incarcerated at a previous time. See pages 37-38 of the April 8, 1993 opinion.

[14]There is no factual dispute as to the text of the court's instructions to the jury on the issue of whether the defendant had engaged in an aggravating circumstance. The effect of the instruction, as an issue of law, is discussed at pages 38-43 of the April 8, 1993 opinion.

trial and penalty phases, diluted the state's burden of proof).[15]

11. Ground 18--(Prosecutor's Dilution of Reasonable doubt Standard in Trial Phase Closing argument).[16]

12. Ground 19--(Court Reporter's re-reading of Portions of Testimony of Key state witness)[.][17]

13. Ground 23--(Conviction based on insufficient evidence).[18]

14. Ground 24--(Denial of Petitioner's Right to

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[15]There is no factual dispute about the text of the court's instruction as it pertained to a definition of reasonable doubt. See pages 29-30 of the April 8, 1993 opinion.

[16]There is no factual dispute about the content of the prosecutor's's closing argument. See pages 30-31 of the April 8, 1993 opinion.

[17]There is no factual dispute about what portion of the testimony of the witness Otis Simmons, Jr. was re-read to the jury. See pages 31-32 of the April 8, 1993 opinion.

[18]There is no factual dispute about what evidence was presented in support of the indictment. It is a question of law as to whether that evidence was sufficient to support the conviction. See discussion of this issue at pages 43-47 of the April 8, 1993 opinion.

Scientific Experts).[19]

15. Ground 25--(Ineffectiveness of Counsel During Trial Phase).[20]

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[19]There is no claim advanced that the petitioner's trial counsel requested, but was denied access to or the appointment of scientific experts to aid in the defense of the petitioner at the trial with respect to the scientific evidence available to the prosecution. Thus there is no factual dispute that would warrant an evidentiary hearing.

[20]During the post conviction hearing, the primary focus was on the petitioner's claim that his appointed counsel denied him the effective assistance of counsel. However, no claim was raised that their failure to seek the appointment and assistance of their own experts on the scientific evidence constituted a denial of the effective assistance of counsel. Now after the court published its April 8, 1993 opinion denying the writ, the petitioner for the first time advances the April 19, 1993 affidavit of Dr. Siegesmund (see footnote #4), apparently for the proposition that the petitioner was denied the effective assistance of counsel because the petitioner's counsel failed to raise questions as to the levels of barium, antimony and lead.

The only basis for granting an evidentiary hearing on this issue would be if the Dr. Siegesmund affidavit rises to the level of a "substantial allegation of newly discovered evidence". Upon reflection, the court concludes that the Dr. Siegesmund affidavit does not constitute "newly discovered evidence." Rather, it is the expression of an opinion that the testimonial conclusions of Lynn and Wilson can not be properly evaluated without knowing the determined levels of barium, antimony and lead. Moreover, Keeney v. Tamayo-Reyes, ___ U.S. ___, 112 S.Ct. 1715 (1992), teaches that a petitioner's failure to develop a claim in state court proceedings will be excused and evidentiary hearing mandated only if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing. The Siegesmund

16. Ground 26--(Aggravating Circumstance was unconstitutionally Vague).[21]

In support of the motion for an evidentiary hearing, the petitioner notes that a study is being done on the Ohio Capital Jury Instructions, apparently to demonstrate the comprehensibility of Ohio's capital sentencing instruction currently in progress. In support of the application for the evidentiary hearing, the affidavit of Randy Ashburn is attached to the petitioner's motion and it states in its entirety as follows:

I, Randy Ashburn, being duly sworn and deposed, do hereby state the following:

1) I am an attorney licensed to practice law in the State of Ohio.

2) I am an Assistant Public Defender employed by the Ohio Public Defender Commission.

3) As part of my duties, I oversee the compilation of statistics regarding capital prosecutions in the State of Ohio.

4) I am currently overseeing a project involving an

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affidavit, viewed in a light most favorable to the petitioner, fails to make a showing that a fundamental miscarriage of justice will result from a failure to hold an evidentiary hearing.

[21]There is no factual dispute with respect to the statutory definitions of a "peace officer" and the issue of whether the aggravating circumstance was unconstitutionally vague is a question of law, not fact.

in-depth analysis of Ohio's capital sentencing jury instructions.

5) I am currently working with numerous experts, including a linguist, a professor of criminal justice, a social-psychologist, and numerous graduate students in regard to this project.

6) The goal of this project is to analyze the comprehensibility of sentencing instructions given to capital jurors in Ohio, in a manner similar to the study conducted by Professor Zeisel in *United States ex rel. Free v. Peters*, 806 F.Supp. 705 (N.D. Ill. 1992), a copy of which is attached to this Affidavit as "Exhibit A."

7) I have been working on the development of this project since October, 1992, and obtained financing approval for the project in March, 1993. It is contemplated that the study will be completed by October, 1993.

8) The survey component of this project requires first putting together the survey questionnaires, and then assuring that the questions are not biased. Next, the surveyors will have access to a reasonably large sample of prospective jurors in a major metropolitan area of Ohio. The survey will then be performed, and finally an in-depth statistical analysis of the results will be made.

9) The linguistic component of this project is a separate endeavor, requiring a detailed examination of the grammatical, syntactic, and lexicological composition of the instructions themselves. It is anticipated that both portions of this project will be completed by October, 1993.

10) Similar studies in other states have shown significant problems with the comprehensibility of capital

sentencing instructions, thus failing to meet federal constitutional requirements for imposition of the death penalty.

11) I was made aware by Petitioner Glenn's counsel, Jane Perry and William Lazaroff, that they felt that the research currently being conducted would be of great importance in regard to various jury instruction issues raised in Petitioner Glenn's habeas corpus action.

12) Preliminary results that I have received in regard to the project currently in progress in Ohio indicate the identical problems with standard jury instruction as in other states, several of which I have been informed were given in Petitioner Glenn's case and raised in his petition for habeas corpus relief.

The court is of the view that none of the grounds for which the petitioner seeks an evidentiary hearing fall within the *Townsend* test that mandates an evidentiary hearing. Moreover, the validity of jury instructions is a matter of law, not fact, and a study of the comprehensibility of the capital jury instructions will inevitably constitute only an opinion that might assist in a refinement of those instructions for the future, but will not constitute a basis in law for declaring that the Ohio capital jury instructions used in this case offend the Constitution.

The petitioner's motion for an evidentiary hearing as set forth in the motion of January 27, 1993 (Docket #62) and as expanded upon his motion to alter or amend is denied.

III. THE PETITIONER'S JANUARY 27, 1993 APPLICATION FOR A STAY OF PROCEEDINGS TO ALLOW INVESTIGATION AND DISCOVERY OF

POTENTIAL CLAIMS AND FOR LEAVE TO AMEND PETITION TO COMPLY WITH MCCLESKEY V. ZANT, 111 S.CT. 1454 (1991). DOCKET NO. 63..

No good cause having been shown, including the information revealed to the court during the *in camera* proceeding conducted on January 27, 1993, the application for a stay is denied.

DOWD, J. Filed: 4/8/93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN GLENN,	:	
Plaintiff,	:	CASE NO. 5:91CV2047
v.	:	
ARTHUR TATE, JR.,	:	JUDGMENT ENTRY
Respondent.	:	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the petition for habeas corpus relief is denied.

The stay of execution of the death sentence previously granted by this Court remains in effect until further order of the Court.

David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN GLENN,	:	
Plaintiff,	:	CASE NO. 5:91CV2047
v.	:	
ARTHUR TATE, JR.,	:	MEMORANDUM OPINION
Defendant.	:	

I. INTRODUCTION[1]

This is an action brought pursuant to 28 U.S.C. §2254 wherein the petitioner John Glenn seeks habeas corpus relief from his conviction of aggravated murder and his death sentence upon the premise that the determinations of his guilt and death sentence violate the United States Constitution.

On October 22, 1981 petitioner John Glenn shot and killed Deputy Sheriff John Litch, Jr. in an attempt to free his incarcerated step-brother Robert Glenn.

On the day of the shooting, Robert Glenn was an inmate at the Mahoning County Jail. Robert suffered from a leg wound and was taken from time to time from the jail to a local hospital for routine treatment. Prior to his scheduled hospital visit on the day of the shooting, the two half brothers conspired to free Robert from custody while he was being transported to the hospital. Deputy Litch was assigned

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[1]For the convenience of the reader, the Court attaches Appendix D which sets forth the page numbers where each of the twenty seven grounds for relief advanced by the petitioner are decided.

to transport Robert to the hospital. While en route, petitioner, driving a turquoise and black Buick, struck Officer Litch's vehicle from the rear. Officer Litch exited his cruiser and approached petitioner and was shot in the chest with a sawed off shotgun. Two off duty firemen observed the accident [sic] and the subsequent shooting and sought immediate emergency care, but Deputy Litch died almost instantly.

Immediately after the shooting, petitioner opened the rear door of the sheriff's cruiser, where Robert was sitting in the back seat, released Robert, and the two fled the scene in petitioner's car. Hours later petitioner was arrested at the home of his girlfriend, Alseen Lanier. Lanier testified at trial that petitioner had told her that he had shot a police officer while "escaping" his half-brother Robert Glenn.

At almost the same moment that petitioner had fired the shot that ended Deputy Litch's life, an acquaintance of petitioner, Otis Simmons, was stopped in the Youngstown area by a police officer for a traffic violation. While sitting in the police cruiser waiting for the officer to write him a ticket, the officer heard the call over the police radio relaying the information about the shooting death of Deputy Litch. Otis informed the officer that earlier in the day, petitioner had tried to borrow a gun and car from him. Otis also told the officer that petitioner had told him of his plans to "escape" his step-brother Robert Glenn. The officer proceeded to relay this information to his dispatcher, and law enforcement officers relied on this information in arrest the petitioner later that evening.

Both Lanier and Otis Simmons testified at petitioner's trial. In addition to their incriminating testimony, the prosecution introduced a chemical test which revealed that petitioner had significant amounts of barium on his hands

consistent with the recent use of a weapon. The prosecution also introduced plaster scrapings found in petitioner's car which matched the plaster on Robert Glenn's leg cast, and a pair of prison overalls found in the back seat of the car that were similar to the ones worn by Robert Glenn on the day of the shooting.

Deputy Sheriff Litch was employed full time as a city fireman, and in addition devoted at least five hours of his time each week to the County of Mahoning, without compensation, in the capacity of an auxiliary deputy sheriff.[2] On the day of the shooting, Litch was driving a marked sheriff's cruiser, and was dressed in the traditional deputy sheriff's uniform.

John Glenn was nineteen years old on the day of the shooting. Evidence produced at trial established that petitioner had been raised in a dysfunctional home. His mother, prone to anger and violence, subjected petitioner and his siblings to routine beatings. The only male figure petitioner was exposed to during his childhood was his stepfather, who introduced the Glenn children to alcohol and marijuana. Petitioner's family was also very poor. The family often went without the basic necessities, such as heat and other utilities.

The petitioner's appointed trial counsel obtained a pre-trial psychiatric examination of the petitioner to determine if he was competent to stand trial. Dr. Anil Nalluri was appointed to conduct the examination. His report indicated that petitioner had borderline intellectual and social functioning, but was competent to stand trial. Petitioner's

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[2]The prosecution contended that Litch was acting as a peace officer as that term is defined under Ohio law.

low IQ placed him in the learning disabled category.

II. HISTORY OF THE CASE.

The procedural history of this case spans over a period of eleven years. Petitioner was tried and convicted of aggravated murder with an aggravating circumstance[3] on August 20, 1982. The trial was conducted in Portage County rather than Mahoning County.[4] The guilt phase of the trial lasted nearly three weeks.[5] The penalty phase began on September 1, 1992 and the jury's recommendation of a death sentence was delivered on September 3, 1982. Pursuant to the statutory provisions regarding capital sentences, the trial court approved the recommendation and sentenced the defendant to death.

Petitioner subsequently filed a direct appeal to the Ohio Eleventh District Court of Appeals. On appeal, petitioner raised the following arguments:

A. Ohio's Death Penalty statutes, O.R.C. §§2903.01, 2929.02, 2929.22, 2929.023, 2929.04, 2929.05, and 2929.06 are unconstitutional and in violation of the sixth,

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[3]The aggravating circumstance the jury found was the killing of a peace officer. O.R.C. §2929.04(A)(6).

[4]An attempt was made to seat a jury in Mahoning County. The attempt lasted over twenty days but was unsuccessful, apparently because of the notoriety that the killing created in Mahoning County.

[5]The guilt phase of the trial in Portage County began on August 2, 1992 and the jury returned its verdict of guilt on August 20, 1982.

eighth and fourteenth amendments.

B. The trial court committed prejudicial error in overruling defendant's motion to dismiss for lack of jurisdiction or in the alternate for amendment to the indictment by striking therefrom the specification under count one of the indictment.

C. The trial court abused its discretion to the prejudice of defendant in restricting the manner and subject matter to which questions on voir dire could be put to the prospective jurors.

D. The trial court abused its discretion when it denied defendant's objection to the entire array of jury members when the record disclosed that no member of a minority race was called as a part of the jury panel.

E. The jury's verdict is against the manifest weight of the evidence.

F. The trial court committed prejudicial error by denying defendant's motion for a new trial and for mistrial after a prosecution witness volunteered testimony that was prejudicial to the defendant's rights.

G. The trial court committed error prejudicial to the defendant by refusing to grant defendant's motion for a new trial during closing arguments on the guilt question.

H. The trial court committed error prejudicial to the defendant by its refusal to grant defendant's motion to sequester the jury during the period of time between its verdict of guilty and the hearing on penalty.

I. The trial court committed error prejudicial to

defendant's rights in the hearing on mitigation by its refusal to admit into evidence, defendant's mitigation exhibits A, B, C, and D and by its refusal to permit testimony of defendant's witness in mitigation.

J. The trial court committed error prejudicial to the defendant's right by overruling defendant's motion to strike certain prejudicial language from the presentence report and the medical examination report.

K. Mr. Glenn's death sentence was inappropriate and disproportionate, and therefore violative of the eighth and fourteenth amendments to the United States Constitution and Section 9, Article I of the Ohio Constitution.

Petitioner's appeal was denied on all counts. *State v. Glenn*, Portage App. No. 1286 (Feb. 19, 1985).

Petitioner appealed the Court of Appeal's decision in the Ohio Supreme Court. Specifically, petitioner raised the following claims before the Ohio Supreme Court:

A. The trial court committed prejudicial error in overruling defendant's motion to declare Ohio Revised Code Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, 2929.05 and 2929.06 effective October 19, 1981, unconstitutional and in violation of the United States Constitution, Amendments VI, VIII, and XIV, and the Ohio Constitution, Article I, Sections 9, 2 and 16.

B. The trial court committed prejudicial error to the right of the defendant in overruling defendant's motion to dismiss for lack of jurisdiction or in the alternate for amendment to the indictment by striking therefrom the specification under count one of the indictment.

C. The trial court abused its discretion to the prejudice of defendant in restricting the manner and subject matter to which questions on voir dire could be put to the prospective jurors.

D. It was error prejudicial to the defendant's right for the court to deny defendant's challenge to the entire array of jury members when the record disclosed that no member of a minority race was called as a part of the panel.

E. The trial court committed prejudicial error by denying defendant's motion for a new trial and for mistrial after a prosecution witness volunteered testimony that was prejudicial to the rights of this defendant.

F. The trial court committed error prejudicial to the defendant's right in failing to grant defendant's motion for a new trial upon the misconduct of the prosecuting attorney during closing arguments on the guilt question.

G. It was prejudicial error for the trial court to overrule defendant's motion for directed verdict of acquittal. The jury's verdict is against the manifest weight of the evidence.

H. The trial court committed error prejudicial to the defendant by its refusal to grant defendant's motion to sequester the jury during the period of time between its verdict of guilty and the hearing on penalty.

I. The trial court committed error prejudicial to defendant's rights in the hearing on mitigation by its refusal to admit into evidence defendant's mitigation exhibits A, B, C and D and by its refusal to permit testimony of defendant's witness in mitigation.

J. The trial court committed error prejudicial to the defendant's right by overruling defendant's motion to strike certain prejudice language from the presentence report and the medical examination report.

K. Mr. Glenn's death sentence was inappropriate and disproportionate, and therefore violative of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I of the Constitution.

The claims were denied. The petitioner's conviction and sentence were affirmed. *State v. Glenn*, 28 Ohio St.2d 451 (1986).

Petitioner then sought a rehearing in the Supreme Court of Ohio on the following claims:

A. Whether at the penalty phase of trial, the trial court properly excluded as hearsay a videotape describing Mr. Glenn's life.

B. Whether the Ohio Supreme Court properly conducted the statutorily required independent review of Mr. Glenn's death sentence pursuant to Ohio Revised Code Section 2929.05.

Upon dismissal of his motion, petitioner filed a supplemental motion for rehearing on the following issue:

A. Whether the court should rehear and reconsider the case because it had insufficient time, due to end of term workload, for adequate consideration of Mr. Glenn's appeal.

This motion was also dismissed by the Ohio Supreme Court.

Petitioner then sought a writ of certiorari before the

United States Supreme Court. In his petition, Mr. Glenn raised the following grounds for relief:

A. Whether the Ohio Supreme Court failed to perform the statutorily required independent review of the appropriateness of Mr. Glenn's death sentence.

B. Whether the Ohio Supreme Court erred in applying a harmless error analysis when the sentencer in Mr. Glenn's case considered an improper non-statutory aggravating circumstance, and mitigating factors did exist.

C. Whether the Ohio Supreme Court has failed to provide clear and consistent rulings concerning the admissibility of mitigating evidence.

Mr. Glenn's petition was denied. *Glenn v. Ohio*, 482 U.S. 931 (1987); *petition for rehearing denied* 483 U.S. 1044 (1987).

Petitioner next filed a state post-conviction petition. At the post-conviction level, petitioner raised numerous grounds:

A. The judgment against petitioner is void or voidable because jurors were incorrectly led to believe the responsibility for determining the appropriateness of the death sentence lay elsewhere.

B. The judgment against petitioner is void or voidable because the trial court failed to excuse for cause a member of the jury who stated that he would automatically impose the death sentence upon a finding of guilty.

C. The judgment against petitioner is void or voidable because he was denied the effective assistance of counsel at the guilt phase of his capital trial.

D. The judgment against petitioner is void or voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial.

E. The judgment against petitioner is void or voidable because of numerous errors and omissions in the trial court's penalty phase charge to the jury.

F. The judgment against petitioner is void or voidable because, outside the presence of counsel, the jurors were provided with a dictionary for use in their penalty phase deliberations.

G. The judgment against petitioner is void or voidable because five unadjudicated offenses were included in the presentence report which both the jurors and trial court considered at the penalty phase.

H. The judgment against petitioner is void or voidable because the trial court gave no weight to relevant mitigating evidence.

I. The judgment against petitioner is void or voidable because he was denied the effective assistance of counsel on his direct appeals as of right.

J. The judgment against petitioner is void or voidable because the appellate courts failed to review the complete record of his capital case as required by law.

Petitioner's post-conviction petition was denied on June 21, 1989.

The denial of post-conviction relief was affirmed by the Ohio Court of Appeals on September 21, 1990. Subsequently, it denied reconsideration of its ruling on

December 7, 1990.

The Ohio Supreme Court dismissed the appeal from the Ohio Court of Appeals on February 20, 1991. *See State v. Glenn*, 57 Ohio St.3d 723. Certiorari was denied by the United States Supreme Court on October 7, 1991. *See Glenn v. Ohio* 112 S.Ct. 110.

The petition in this case was filed on October 10, 1991. The Court promptly granted the petitioner's motion to stay the execution of the death sentence scheduled for October 21, 1991. On November 13, 1991 the Court ordered the respondent to move or answer within sixty days. On January 13, 1992, the respondent moved to extend the time to February 12, 1992 to show cause why the petition should not be granted. Eventually the 81 page return of writ was filed by the respondent on March 13, 1992. The petitioner was granted leave on March 30, 1992 to extend the time for 90 days to file the traverse. The time for filing a traverse was extended to July 20, 1992 and then again until July 24, 1992. The 190 page traverse was filed on July 24, 1992. A corrected copy of the traverse numbering 198 pages was subsequently filed on August 31, 1992. On January 27, 1993 the Court entertained oral argument by counsel for the parties.[6]

III. OHIO'S DEATH PENALTY STATUTE

Ohio has been a capital punishment state for many years. However, Ohio's statute was determined to be

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[6]A transcript of the oral argument is filed with the Clerk. *See* Docket #67.

unconstitutional until Ohio provided for a bifurcated proceeding in capital offense cases. The legislation providing for the bifurcated proceedings applicable to this case became effective on October 19, 1981.[7] The penalties for aggravated murder are set forth in O.R.C. §2929.02, *et seq.* In this case, the indictment stated in its entirety as follows:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of this County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that JOHN GLENN on the 22nd day of October, 1981, at the County of Mahoning aforesaid,

FIRST COUNT: did purposely cause the death of another, to-wit: Deputy Sheriff John Litch, Jr., while committing, attempting to commit, fleeing immediately after committing or attempting to commit the crime of Escape (O.R.C. 2921.34(A)) of Robert Glenn from lawful detention.

SPECIFICATION TO THE FIRST COUNT: The Grand Jurors further find and specify that the victim of the offense, Deputy Sheriff John Litch, Jr., was a peace officer, as defined by Section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his

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[7]After it became apparent that death sentences would be struck down by the United States Supreme Court absent a bifurcated proceeding dealing first with guilt and secondly with punishment, the Ohio Legislature adopted a bifurcated proceeding. However, the United States Supreme Court declared Ohio's first attempt unconstitutional in *Lockett v. Ohio*, 438 U.S. 586 (1978), and discussed in more detail beginning at page 77 of this opinion.

duties, or it was the offender's specific purpose to kill a peace officer.

SECOND COUNT: did, knowing that Robert Glenn was under detention, purposely break or attempt to break such detention,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

The jury found the defendant guilty of an aggravating circumstance. Pursuant to provisions of O.R.C. §2923.03(c)(2), if a defendant is convicted of aggravated murder and of one or more specifications of an aggravating circumstance as listed O.R.C. §2929.04(A), then the possible penalties are death, life imprisonment with parole eligibility after serving 20 full years of imprisonment, or life imprisonment with parole eligibility after serving 30 full years of imprisonment.

Where there is a conviction of aggravated murder with an aggravated circumstance as in this case, the sentence or mitigation hearing is then conducted pursuant to the provisions of O.R.C. §2929.03(D)(1).

Where death may be imposed as a penalty the defendant has several choices to make following the guilt phase of the trial. First, at his sole option, he may request either or both a pre-sentence investigation and a mental examination. If such requests are made by the defendant, then the court is required to have a pre-sentence investigation and a mental examination conducted and the reports are to be provided to members of the jury during the sentencing phase of the trial. O.R.C. §2929.04(B) sets forth a list of possible mitigating circumstances which the jury is to consider after there has

been a determination of an aggravating circumstance. The potential mitigating factors follow:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

Where the defendant establishes one or more of the mitigating circumstances it then is incumbent upon the jury pursuant to O.R.C. §2929.03(D)(2) and (3) to determine

whether the aggravating circumstances of which the defendant was found guilty of committing outweigh the mitigating factors. Where such a determination is made the jury then is instructed to recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to either life imprisonment with parole eligibility after 20 years or to life imprisonment with parole eligibility after serving 30 years of imprisonment.

IV. SUMMARY OF THE GROUNDS FOR RELIEF.

The petitioner advances twenty seven grounds for relief and appendix A lists the wording of the specific grounds. Some of the grounds for relief attack the petitioner's conviction and others relate solely to the sentencing phase of the case.

As a threshold principle, the grounds for relief in federal habeas corpus must relate to alleged violations of the Constitution, laws or treaties of the United States. 42 U.S. C. §2254(a). Thus, federal courts do not review state convictions under the provisions of 42 U.S.C. §2254 for alleged violations of state law.

Moreover, claims cognizable under 42 U.S.C. §2254 are not routinely reviewed in federal habeas corpus unless the claim was initially asserted in state court so as to give, in the interests of state-federal comity, the state courts the opportunity to review the alleged constitutional violation.

Initially, the Court will review the grounds where the respondent argues that state procedural default on the part of the petitioner negates his right to federal habeas corpus review.

V. STATE PROCEDURAL DEFAULT.

The application of state procedural default barring federal court review of alleged constitutional errors in a state conviction has been a prolific source for appellate decisions.

Initially, *Faye v. Noia*, 372 U.S. 391 (1963) did not bar review of the constitutional claim for state procedural default unless the court found that there was a deliberate-bypass of the constitutional claim first raised in federal habeas corpus. The *Faye v. Noia* standard was at least partially rejected by *Wainwright v. Sykes*, 433 U.S. 72 (1977) as the deliberate-bypass rule was rejected in that case for the "cause" and "prejudice" test. The burden was placed on the petitioner to demonstrate cause for the failure to advance the constitutional issue in state court. If the petitioner could demonstrate "cause", the next burden placed on the petitioner was to demonstrate "prejudice".

Any lingering doubt about the continuing viability of *Faye v. Noia* was removed by *Coleman v. Thompson*, __ U.S. __, 111 S.Ct. 2546 (1991) which explicitly held that the *Wainwright v. Sykes* test of cause and prejudice was the standard, as Justice O'Connor writing for the 6-3 majority declared:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

Id. at 2565.

Moreover, the cause and prejudice standard applies equally to capital and non-capital cases. *Smith v. Murray*, 477 U.S. 527 (1986).

The Court will thus initially consider and determine the "cause and prejudice" issue where raised by the respondent.

VI. RESOLUTION OF THE CAUSE AND PREJUDICE ISSUES.

(1) Ground Three

The petitioner was indicted by the Mahoning County grand jury for the killing of Deputy Litch in Youngstown, the county seat. After the failure to seat a jury, the petitioner's motion for a change of venue was granted. The trial was shifted to and completed in neighboring Portage County.

The petitioner now raises for the first time in this action the claim that the decision to transfer the case to Portage County violated petitioner's right to due process because the minority population of Portage County is, on a percentage basis, lower than that of Mahoning County.

The petitioner argues that the challenge to the jury array in Portage County was the equivalent to a challenge to the venue. The Court disagrees. No cause has been demonstrated for the failure to raise the issue of venue in state court. Applying *Wainwright*, the third ground is dismissed.

Looking beyond the procedural default, the Court finds that this claim lacks merit. The fact that the trial was transferred, following petitioner's request for a change of

venue[8], from a County where blacks made up 14.2% of the population to a neighboring County where blacks comprised less than 3% of the population did not *per se* violate petitioner's due process and Sixth Amendment rights.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court held that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury ... ." *Id.* at 528. However, this is not to say that the defendant is entitled to a jury of any particular composition, or one that reflects the various distinctive groups in the community. *Id.* Still, the State may not systematically exclude distinctive groups from consideration for jury service. *Batson v. Kentucky*, 476 U.S. 79 (1985); and *Taylor, supra.*

It is true that the trial court transferred petitioner's trial to a county with a small black population, and that there were no blacks in petitioner's venire, and, as a result, no blacks served on petitioner's jury. However, petitioner has presented no evidence to prove that, in acting upon petitioner's motion to change venue, the trial court intentionally and systematically chose to deny petitioner his right to trial by an impartial jury comprised of a fair cross section of the community. The transfer of a case from a county with a relatively large black population, to one with a relatively small black population, without more is insufficient to establish unconstitutional exclusion. Finding non intentional or systematic exclusion of blacks from

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[8]The trial judge granted petitioner's request to transfer the case after the court had devoted twenty three days to seating a jury, but was unable to do so. The inability to seat a fair jury in Youngstown was apparently the result of the publicity that petitioner's case had received in Mahoning County.

petitioner's venire, petitioner's claim would fail on the merits.

(2) Ground Seven

The petitioner argues that his death sentence must be vacated because the pre-sentence report submitted to the jury during the sentencing phase contained juvenile charges for which he had not been convicted. However, the issue was not raised on direct appeal. As this sentencing issue should have been raised on direct appeal, *Wainwright* applies and Ground seven is dismissed.

Had the claim been properly preserved, it still would have failed on the merits. Petitioner argues that the inclusion of the unadjudicated charges in the pre-sentence investigation report (PSI) unjustly prejudiced him in two ways. First, the unproven charges of assault, robbery, auto theft and gross sexual imposition created a non-statutory aggravating circumstance which could have weighed heavily against the mitigating circumstances presented by the petitioner. Second, inclusion of the unadjudicated charges "negated a statutory mitigating factor on which [petitioner] relied," namely no significant prior criminal record. (Petitioner's Traverse at 62).

Both the Ohio Supreme Court and the Ohio Court of Appeals on the post-conviction remedy found that the trial court erred in allowing the unproven charges to remain on the PSI. This Court agrees that the trial court erred, and that the potential for prejudice existed. *See United States v. Hasting*, 461 U.S. 499 (1983).

This court agrees with the Ohio Supreme Court and the Ohio Court of Appeals which concluded that the error was harmless. Finding harmless error, the Court would have

denied the claim on the merits.

(3) Ground Eight

Petitioner claims that he was denied an impartial jury because one of the jurors initially declared "that he would automatically impose the death sentence". This issue was waived by the petitioner's failure to raise it on direct appeal and Ground eight is dismissed.

Looking beyond the procedural default, the Court finds that this claim lacks merit. Petitioner argues that juror Edwin Guenther should have been excused for cause because of his strong views regarding the death penalty. Edwin Guenther initially indicated that he would automatically sentence the petitioner to death if he was found guilty:

Q. ...If you're called upon as a juror could you consider all the penalties or would your beliefs, if you have any, eause you automatically to vote against the imposition of the death penalty without regard to any evidence that might be developed at the trial?

A. I would vote for it if he's guilty.

Q. Now, that's--are you saying if he's guilty you would automatically vote for the death penalty?

A. That's right.

Q. Would you listen to the other evidence that might be offered and maybe consider that and decide maybe the death penalty shouldn't be applied?

A. I--second preference?

Q. I'm asking you can you listen to the evidence and make a judgment, whatever it might be, it might be that you would recommend that he go to jail or might recommend that he be put to death. You'd have to maybe take a choice. Could you do that?

A. I can.

Q. All right. That was the gist of the question. Would you consider all penalties and make whatever judgment under conscience would require you to make?

A. I would judge all penalties.

(Tr. 563-64). Further questioning by the defense counsel demonstrated that Mr. Guenther did not understand the death penalty procedure in Ohio.

Q. ...Would you automatically vote for [the death penalty]?

A. Well, if he's proven guilty---

Q. Well, that's what I'm trying to get to. The law won't permit you to do that, do you understand?

A. The law don't?

Q. Well, that is what the judge was trying to get you to say or trying to ask you whether or not you would consider, assuming he's guilty--

A. Right.

Q. --assuming you participated in that decision--

A. Prove--

Q. --now you come to the second stage.

A. We have a state law, don't we?

Q. Yes, sir.

A. Well, we have to uphold our state law, don't we?

Q. Yes, sir. Well, do you follow me to distinguish on one hand between his being guilty as you say and the need for you as a member of this jury to consider other factors in whether or not you recommend or do not recommend the death penalty?

A. Well, I would try to get other factors first.

Q. You wouldn't automatically, as you say, because he's proven guilty then go the next step to vote for the death penalty?

A. The last resource. That would be my last resource.
[*sic*]

(Tr. 583-584).

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that prospective jurors in a capital case cannot be discharged for cause merely because they express a conscientious objection to capital punishment. In a footnote in *Witherspoon*, the Court set out the standard for determining whether a juror has been properly excused for prejudicial bias toward the death penalty. Jurors may be excluded for cause if they make it

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to the evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Witherspoon, supra at 522, n.21 (emphasis in original).

Subsequent courts have modified the *Witherspoon* standard, making it increasingly difficult to challenge a juror on his beliefs regarding the death penalty. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Court held that the trial court should inquire as to:

> [w]hether the juror's view would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Witt, supra at 421, *quoting Adams v. Texas*, 488 U.S. 38, 44 (1980). Later courts have held that the *Adams* standard is to be applied to situations where a prospective juror's beliefs regarding the death penalty would prevent the juror from considering sentences other than death. *See Ross v. Oklahoma*, 487 U.S. 81 (1987).

Even under the more demanding standards employed by the post-*Witherspoon* courts, it was not error for the trial court to seat juror Edwin Guenther. While Mr. Guenther initially indicated that he would "automatically" impose the death penalty upon a conviction, he later stated that he would consider all available sentences, including death and life imprisonment, before he made his decision. It is true, as petitioner notes, that it appears from the record that Mr. Guenther was surprised to learn that a death sentence did not automatically follow a finding of guilty. However, once

defense counsel explained the sentencing process in a capital trial to Mr. Guenther, he represented to the court that he would follow the law. It is evident from the record that Mr. Guenther, while perhaps an advocate of the death penalty[9], clearly indicated that he would consider all options before imposing sentence.

Further, this Court must given deference to the trial court's finding that Mr. Guenther was fit to serve as an unbiased juror, since it was the trial court who had the opportunity to view the demeanor and credibility of the prospective juror. *Wainwright v. Witt, supra* at 428. Thus, it was not error for the trial court to seat Mr. Guenther on petitioner's jury.

(4) Ground Nine

Petitioner claims that the sentence is invalid "because the trial court refused to instruct the jurors that mercy was a valid consideration". The claim was not raised on direct appeal, but was considered during the post-conviction proceedings. The motion to dismiss for procedural default is denied.

(5) Ground Ten

Petitioner claims that the penalty phase jury charge "effectively made [the death] sentence mandatory." This

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[9]Guenther indicated that he favored the death penalty because it was a burden on taxpayers to have to incarcerate felons, and because if certain criminals are ever returned to society following a long prison term they may commit future crimes of violence. (Tr. at 581-582).

issue was not raised on direct appeal and then was abandoned during the appellate phase of the post-conviction stage. No cause having been demonstrated, Ground Ten is dismissed.

Looking to the merits of the claim, the Court finds that the claim would not have survived review. Petitioner argues that the trial court erred when it instructed the jury "[r]easonable doubt is present when after you have carefully considered and compared all of the evidence, you cannot say you are firmly convinced of the *truth of the charge*. (emphasis in petitioner's traverse). This, coupled with the trial court's instruction that they were to return a death verdict if they found that the prosecution had met its burden, created a mandatory presumption in favor of death since the jury had already found that the petitioner was guilty of the *charge* of aggravated murder.

It is axiomatic that a jury instruction may not serve as a presumption in favor of the state with regards to guilt or sentencing. *Sandstrom v. Montana*, 422 U.S. 510 (1979); and *Woodson v. North Carolina*, 428 U.S. 280 (1976). In passing on state jury instructions, federal habeas courts must review the entire charge and determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction [or sentence] violates due process." *Estelle v. McGuire*, __ U.S. __, 112 S.Ct. 475, 482 (1991), *quoting, Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

The Court finds that the instruction in question, though arguably could be interpreted a number of ways, did not taint the entire charge so as to deprive petitioner of due process. In his charge, the trial court carefully identified the statutory aggravating and mitigating circumstances, and explained the weighing process that was to be performed. The trial court specifically instructed the jury:

> If all 12 members of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstance which John Glenn was found guilty of committing outweigh[s] the mitigating factors then you must return such finding to the Court. If you make such a finding, you must recommend to the Court that the sentence of death be imposed to the defendant, John Glenn.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the statement of John Glenn, and the argument by counsel, you find the State of Ohio failed to prove the aggravating circumstance which the defendant John Glenn was guilty of committing, outweighs the mitigating factors, then you will return your verdict reflecting your decision and the death penalty cannot be imposed.

(Tr. transcript at 3047).

From this instruction, the reasonable juror would have understood that she was not to automatically recommend a death sentence, but rather was to engage in a weighing process consistent with O.R.C. §2929. Had petitioner preserved this claim, it would have been denied.

(6) Ground Eleven

Petitioner claims that constitutional violations resulted when the trial court instructed the jurors on statutory mitigating factors which petitioner did not raise during the sentencing phase. No direct appeal was taken on this issue. However, it was initially raised during post-conviction, but abandoned on appeal to the Ohio Supreme Court. No cause having been shown, Ground Eleven is dismissed.

A review of this claim on the merits would lead to the conclusion that it does not entitle petitioner to relief. In identifying the statutory mitigating circumstances, the trial court merely alerted the jury to any possible mitigating circumstances. However, if the identification of statutory mitigating circumstances not presented by petitioner prejudiced the petitioner by calling attention to any factors for which he offered no evidence, the trial court cured this when he charged the jury that:

> It is only the quality of the aggravating circumstances versus the quality of the mitigating factors which is to be the basis of your decision. The quality or importance of the mitigating factors and the aggravating circumstances must also be considered.

(Tr. transcript at 3046).

By specifically instructing the jury that it is the quality and not the quantity of mitigating circumstances that is to be considered, the trial court removed all possible prejudice to petitioner. As a result, had this claim been before this Court, it would have been denied.

(7) Ground Twelve

Petitioner claims constitutional violations because of the fact that the jury used a dictionary during the sentencing phase of its deliberations. The issue was not raised on direct appeal and then was abandoned during the appellate phase of the post-conviction. No cause have been shown, Ground Twelve is dismissed.

However, a review of this claim on the merits would also have ended in dismissal. While the use of a dictionary by the jury during its deliberations was misconduct, it was

not *per se* prejudicial misconduct as petitioner contends. *United States v. Duncan*, 598 F.2d 839 (4th Cir. 1979), *citing*, *Rodriguez y Paz v. United States*, 473 F.2d 662 (5th Cir. 1973) (*per curiam*). In addition to error, petitioner must demonstrate "some likelihood that the extrinsic materials could have affected the jury verdict in order to justify a new trial." *United States v. Hill*, 688 F.2d 18 (6th Cir. 1982). Petitioner has provided no evidence which would suggest that the jury's verdict and sentence rest on definitions the jurors gleaned from the dictionary. Having failed to make such a showing, petitioner's twelfth ground would have been dismissed.

(8) Ground Fourteen

Petitioner contends that the sentencing judge failed to give weight and effect to mitigating evidence. The issue was not raised on direct appeal, but was raised during the post-conviction stage. Then the claim was abandoned on appeal. Here the petitioner argues both cause and prejudice. The Court denies the respondent's motion to dismiss the claim and will consider it on its merits.

(9) Ground Fifteen

Petitioner contends that the failure of the trial court to declare a mistrial when two deputies during cross examination by petitioner's [sic] indicated that the petitioner had previously been incarcerated violated the Constitution. The respondent concedes that the issue has been raised in state court, but not as a federal constitutional violation. The court denies the respondent's motion to deny relief on the basis of a federal claim not raised in state court and will consider the issue on its merits.

(10) Ground Seventeen

The petitioner advances the argument that Ohio's statutory definition of reasonable doubt dilutes the State's burden of proof.

Clearly, the issue was not previously raised in the state proceedings and state procedural default applies. Ground Seventeen is dismissed.

Had petitioner preserved this claim it would not have survived review on the merits. As petitioner concedes, the instruction on reasonable doubt is consistent with the Ohio statute, *See* O.R.C. [*sic*]

§2901.05(D).[10] The Sixth Circuit has specifically held this statute to be constitutional on two separate occasions. *Nabozny v. Marshall*, 781 F.2d 83, 84 (6th Cir. 1986); and *Thomas v. Arn*, 704 F.2d 865, 867-869 (6th Cir. 1983). This Court agrees and holds that the trial court's instruction on reasonable doubt did not unconstitutionally shift the

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[10]The trial court instructed the jury that:

> Reasonable doubt is present when after you have carefully considered and compared all of the evidence you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of their own affairs.

Tr. transcript at 2596-2597; 3044.

prosecutor's burden of proof.[11] As such, ground 17 would have been dismissed on the merits.

(11) Ground Eighteen

The petitioner contends that the prosecuting attorney diluted the concept of reasonable doubt by his argument which made reference to the same kind of proof one would require in buying a house. Again, as claimed by the respondent, the Court finds a state procedural default as the issue was not raised in the Ohio courts. Ground Eighteen is dismissed.

Reaching beyond the procedural default to the merits of the claim, it appears that it is merely an outgrowth of ground 17. Petitioner claims that the prosecutor's example of deciding whether to buy a home, in concert with the alleged erroneous reasonable doubt charge issued by the trial court, diluted the prosecutor's burden of proof. Having found that the charge, itself, was appropriate, the Court would also have found that the comment by the prosecutor during closing arguments was appropriate as it was merely an example of an important decision in an individual juror's life. Petitioner's eighteenth ground would also have been

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[11]Petitioner argued that a better instruction would have emphasized doubt causing a person to refrain from action rather than a doubt which causes a person to act. *United States v. Noon*, 913 F.2d 20 (1st Cir. 1990); *United States v. Colon*, 835 F.2d [*sic*] (2nd Cir. 1987); and *United States v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976). A habeas court cannot reverse a conviction because the best or most appropriate charge was not given to the jury. Rather, the court must determine whether the charge was in error and if so, whether the error "infected the entire trial." *Estelle, supra* (citation omitted).

dismissed on the merits.

(12) Ground Nineteen

The petitioner claims that the decision of the trial court to permit the court reporter to re-read portions of the testimony of a key state witness during the jury's deliberations on the guilt phase of the trial was a constitutional violation. This claim was not raised in state court and is dismissed for state procedural default.

Had petitioner preserved this claim, the Court would have found error, but without the attending prejudice necessary to reverse petitioner's conviction. After they began their deliberations, the jury requested that portions of Otis Simmons, Jr.'s testimony be re-read, and the trial court granted their request. Simmons testified at trial that he informed the police on the day of the shooting that petitioner had approached him to buy a car and a gun to assist him in helping his step-brother escape from custody.

It was error for the trial court to re-read only a portion of Simmons' testimony. "The rereading of a witness' testimony is disfavored when it duly emphasizes that testimony." *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985). *See also United States v. Nolan*, 700 F.2d 479 (9th Cir. 1983). In the present case, the court only re-read the portion of the testimony which was especially harmful to petitioner. The court did not have re-read the balance of the testimony, including the cross-examination of Simmons wherein defense counsel impeached Simmons by demonstrating that the witness had a significant criminal history and was testifying to avoid a weapons charge. In re-reading only a portion of the testimony, the trial court placed undo emphasis on the evidence.

Nevertheless, the Court finds that this error, considered in isolation, was insufficient to demonstrate the prejudice necessary to establish a constitutional violation. Had petitioner preserved this claim it would have been dismissed.

(13) Ground Twenty

The petitioner claims that his appellate counsel on direct appeal was ineffective. The respondent concedes that this issue was raised in post-conviction, but argues that the discrete failures which support the claim of the ineffective assistance of appellate counsel are all subject to procedural default or waiver and thus the underlying claim in Ground Twenty should be dismissed. The Court disagrees and will consider the merits of Ground Twenty.

(14) Ground Twenty Five

The petitioner argues that he was denied the effective assistance of counsel during the guilt phase of the trial. the respondent's claim that this issue fails for state procedural default is without merit. The claim will be considered on its merits.

(15) Ground Twenty Six

The petitioner advances the claim that the aggravating factor with respect to murder of a peace officer was unconstitutionally vague. The petitioner claims that the issue was not presented in state court as a constitutional issue and thus state procedural default applies. It is a close question, but the Court will consider the issue on its merits.

(16) Ground Twenty Seven

The petitioner challenges a number of prosecutorial statements during the trial as rising to the level of a constitutional violation. The challenge to prosecutorial conduct in state court was limited to closing arguments. The respondent's claim of state procedural default is well taken and Ground Twenty seven is dismissed.

Looking beyond the procedural default, the Court finds that the petitioner's claim lacks merit. While petitioner cites a number of instances where the prosecutor allegedly overstepped his authority in his closing arguments, none of these incidents, separate or considered together, can be said to have denied petitioner his constitutional rights.

In order to make out a claim for prosecutorial misconduct a defendant must establish both the existence of prosecutorial misconduct, and that the misconduct affected the fairness of the trial. *United States v. Aichele*, 941 F.2d 761, 765 (9th Cir. 1991). "[T]o deny a fair trial, prosecutorial misconduct must be so pronounced that it permeates the entire atmosphere of the trial." *United States v. Warner*, 971 F.2d 1189, 1205 (6th Cir. 1992). *See also United States v. Young*, 470 U.S. 1 (1984).

First, petitioner notes that the prosecutor told the jury that they were the "third link" in law enforcement. Second, petitioner argues that the prosecutor improperly gave his personal opinion that petitioner's criminal history was significant. Third, the prosecutor "repeatedly mischaracterized the evidence adduced at trial." (Petitioner's traverse at 183).

The Court finds that each of the above-mentioned errors was harmless in light of curative charges given by the court. The trial court sustained defense counsel's objection to the prosecutor's "third link" comment, as well as defense

counsel's objection to the prosecutor's attempt to inject his personal opinion as to petitioner's criminal history. Further, the trial court charged the jury that they were to disregard any evidence or statement that was sustained. Finally, the trial court instructed the jury that they were the sole judges of the fact and that they need not rely on the recollection of the court or the attorneys.

Petitioner also complains that the prosecutor improperly stated that he personally believed that petitioner was guilty, made derogatory comments regarding petitioner's exercise of his statutory right to make an unsworn statement at the sentencing hearing, argued against giving mercy, and emphasized the impact of the victim's death on the community.

While it is improper for a prosecutor to comment on a defendant's decision not to take the stand in his own defense[12], the Ohio Supreme Court has held that this prohibition does not extend to comments regarding a defendant's introduction of unsworn statements at sentencing. *Ohio v. Broom*, 40 Ohio St.3d 277, 287 (1988). The Ohio Supreme Court held, and this Court agrees that merely pointing out that the statements are not under oath and were not subject to cross examination does not present the same opportunity for negative inferences that might occur if a defendant fails to take the stand in his own defense at the guilt phase of any criminal trial. Even if the prosecutor's comment were in error, the Court would find them harmless in light of the substantial disparity between evidence of aggravating and mitigating circumstances.

It is also improper for a prosecutor to offer his own

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[12]Griffin v. California, 380 U.S. 609 (1965).

personal opinion as to the defendant's guilt.[13] Still, the prosecutor's comment did not amount to prejudicial error. The prosecutor stated that the jury had heard the same evidence that he had heard, and that there was but one conclusion that could be reached, that being that the petitioner was guilty of aggravated murder. Prior to his statement, he thoroughly reviewed the evidence. Thus, his main point was that the evidence was sufficient to convict, which is appropriate argument. While his comment regarding his personal belief was inappropriate, it was merely made in passing with the focus on the evidence, and it was not so egregious as to deprive the petitioner of a fair trial in light of the overwhelming evidence regarding the aggravating circumstance.

Finally, the Court finds that it was not error for the prosecutor to emphasize the impact of the victim's death on the community. In *Payne v. Tennessee*, 111 S.Ct. 2957, 2609 (1991), the Court held that the sentencing jury has a right to "victim impact" [*sic*]

evidence.[14]

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[13]United States v. Young, 470 U.S. 1 (1985).

[14]The *Payne* decision overruled two prior decision of the Court: *South Carolina v. Gathers*, 490 U.S. 805 (1989); and *Booth v. Maryland*, 482 U.S. 496 (1987). Even if *Payne* does not enjoy retroactive application, and that under *Booth* and *Gathers* "victim impact" statements were inappropriate at the time of petitioner's trial, the Court would find that the error was harmless in light of the evidence produced at the penalty phase of the trial.

In sum, the Court would find that the prosecutor did not exceed his authority during closing arguments, and that if those comments and remarks were inappropriate, and thus made in error, they did not have such a substantial impact so as to deny petitioner a fair trial.

CONCLUSION

For the reasons set forth, the Court dismisses Grounds 3, 7, 8, 10, 11, 12, 17, 18, 19, and 27 for procedural default. However, as indicated, were these grounds to be considered on their merits, the Court would find each without merit.

The Court will consider hereafter Grounds 1-2-4-5-6-9-13-14-15-16-20-21-22-23-24-25-26 on the merits.

VII. THE COURT'S RULINGS ON THE PETITIONER'S GROUNDS THAT RELATE TO THE GUILT PHASE OF HIS TRIAL.

A. Ground Fifteen

The petitioner contends that the failure of the trial judge to grant a mistrial because two deputy sheriffs, during examination by the defense, offered testimony that indicated that the petitioner had been incarcerated in the past, denied the petitioner his right to a fair trial and violated the Due Process Clause of the Fourteenth Amendment. Justice Holmes of the Ohio Supreme Court addressed this issue on the direct appeal and wrote:

> Sheriff's department employees Robert Knight and Sgt. James S. Horvath each gave answers to defense counsel's cross examination questions which indicated that appellant had been incarcerated at a prior time.

This, appellant asserts, was error of such magnitude as to prejudice the proceedings and, further, was done willfully so as to constitute misconduct by a witness for the state pursuant to Crim. R. 33(A)(2).

While the witnesses' responses were unfortunate, there is nothing about the wording that would support the view that they were given with sinister motive or made so as to harm the appellant's case. Robert Knight was questioned about his duties as the custodian of records of medical treatment given to prisoners. In one of his responses he differentiated among those records, stating: "That is on Robert Glenn. That is John Glenn's chart there." This response seems natural, even if it did reveal that the witness had custody of, and brought records which included, appellant.

In the questioning of Sgt. Horvath, it was apparent that the question was carefully phrased so as to exclude matters not "in reference to this case." However, the question as asked apparently emphasized whether the officer had "seen or met or knew--come to known [*sic*] the defendant, John Glenn ***." The trial court stated, out of the jurors' hearing, that he too believed the question to be an inquiry whether the witness had ever known appellant prior to the date of the crime. Ultimately, the court found that "*** the question was so ambiguous that it lends itself to an answer." Consequently, the answer, although harmful to appellant, could quite innocently have been given, with no misconduct whatsoever. *As to the harmfulness of the answer, the trial judge gave a clear and unequivocal curative instruction that the jury was to ignore the answer.* It cannot, therefore, be said that appellant was thereby prejudiced or prevented from obtaining a fair trial. (Emphasis added).

State v. Glenn, 28 Ohio St.3d at 455.

The trial court gave a curative instruction. Upon review, and assuming that the issue has been preserved as a federal issue, the Court finds that the testimony, in light of the curative instruction, did not deny the petitioner his right to a fair trial and the fifteenth ground is denied.

B. Ground Sixteen

The petitioner argues that the "jury was not instructed to find unanimously, or even by a substantial majority, every element of the capital offense with which petitioner was charged." The petitioner concedes that this issue was not raised in the state court but, in reliance on *Coleman v. Thompson*, *supra*, alleges that the failure should be excused because a substantial miscarriage of justice will follow a denial of habeas relief because of the erroneous instruction.

Prior to 1974, Ohio had, by way of statute, established the crimes of first degree murder, second degree murder, and manslaughter. In 1974, the crime of first degree murder was replaced by the crime of aggravated murder as set forth in O.R.C. §2903.01.[15]

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[15]O.R.C. §2903.01 provides in pertinent part:

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after coming [*sic*] or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

The issue of whether a conviction of aggravated murder will be a capital case turns on whether the indictment contains one or more allegations of an aggravating circumstance as described by O.R.C. §2929.04(A).[16] The indictment charged the petitioner with the aggravating circumstance described in O.R.C. §2929.04(A)(6).

The O.R.C. §2929.04(A)(6) peace officer aggravating circumstance is set forth in the indictment in the alternative. The court's charge to the jury[17] and the form of the jury's

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> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code....

[16]O.R.C. 2929.04 states in pertinent part as follows:

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> ...
>
> (6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

[17]"The State charges that the defendant, John Glenn, committed the offense of aggravated murder of John Litch, Jr., and that the said John Litch, Jr., was a police officer as defined in Section 2935.01 of the Ohio Revised Code, whom the defendant, John Glenn, had reasonable cause to know that he was a peace officer, and who at the time was engaged in his duties as a peace officer, *or* it was the offender's specific purpose to kill a peace

verdict on the issue of whether the prosecution had proved the aggravating circumstance was also framed in the alternative.[18]

As a consequence, the petitioner contends that absent a separate declaration by the jury, it is possible that only half of the jurors found the first alternative to have been proved and the remaining jurors could have found that only the second alternative was proved with the result that the verdict as it relates to the aggravating circumstance is lacking in a unanimous jury verdict thereby offending the constitution.

The Court understands the petitioner, confronted with the recent decision in *Schad v. Arizona*, __ U.S. __, 111 S.Ct. 2491 (1991), to be arguing that the two states of mind involved in the alternatives dealing with peace officer killings in O.R.C. 2929.04(A)(6) to be so different that the general verdict returned by the jury violates due process.

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officer." Tr. p. 2607 (emphasis added).

[18]The jury verdict form as to the alleged aggravating circumstance read:

> "We, the Jury, further find the defendant, John Glenn," then a blank, "--of the aggravating circumstance as set forth in the specification, to wit: That the victim of the offense, Deputy Sheriff John Litch, Jr., was a peace officer as defined in Section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim at the time of the commission of the offense was engaged in his duties *or* it was the offender's specific purpose to kill a peace officer."

Tr. at 2609 (emphasis added).

The petitioner has a threshold problem in advancing this argument. The issue is raised for the first time in this case. There is a conceded procedural default, but the petitioner argues that federal habeas review is not foreclosed because a failure to consider the claim first raised here will result in a fundamental miscarriage of justice.

A review of the transcript indicates otherwise. The victim was driving a marked sheriff's vehicle when rammed by the petitioner. He was dressed in a uniform indicating that he was a deputy sheriff. He approached the vehicle in which the petitioner was seated and felled by a blast from a sawed off shotgun. A review of the transcript reflects that the defense advanced in this case was one of mistaken identity. No issue was raised that neither of the alternatives set forth in the peace officer aggravating circumstance applied, other than to argue that Deputy Sheriff Litch was not a peace officer because of his role as an auxiliary deputy. No argument was advanced that the petitioner did not have reasonable cause to know that Litch was a peace officer, nor was there any argument advanced that the petitioner did not have a specific purpose to kill Litch. The only discussion in the final argument about the aggravating circumstance was the prosecutor's argument that the government had proved both alternatives.[19]

Under these circumstances, the Court finds that there will be no fundamental miscarriage of justice by failing at this late date to consider whether there was a due process violation in the trial court's failure, despite the absence of an objection by the petitioner, to place the issue of the alternatives in O.R.C. 2929.04(A)(6) before the jury in appropriate verdict forms.

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[19] *See* Trial Transcript at 2393-2395.

The sixteenth ground for relief is denied.

C. Ground Twenty Three

This ground for relief challenges the sufficiency of the evidence to warrant the petitioner's conviction of aggravated murder. In acknowledgment of the teachings of *Jackson v. Virginia*, 443 U.S. 307, 316-317 (1979) petitioner argues that he is entitled to habeas corpus relief because "no rational trier of fact could have found proof beyond a reasonable doubt."

It is well settled that a claim of insufficiency of evidence is to be examined in the light most favorable to the government. *Jackson*, 443 U.S. at 319.

Initially, the Court observes that 28 U.S.C. §2254(d)[20] provides that a written opinion of a state court shall be presumed to be correct. Consequently the Court turns to an examination of the opinions of the two Ohio appellate courts that considered and wrote on the subject of whether the

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[20]28 U.S.C. §2254(d) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus of a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct....

defendant's conviction was supported by sufficient evidence.

The Ohio Court of Appeals summarized the evidence in its opinion as follows:

> The ultimate description of the vehicle which struck Deputy Litch's patrol car, as transmitted by police dispatchers, was consistent with the description given by eye witnesses and matched that of the car appellant was driving the day in question. Various descriptions of the occupants of the car and their attire also coincided with appellant and his half-brother, Robert. Appellant spoke with two witnesses concerning his plans to effectuate Robert's escape. Otis Simmons, one of these particular witnesses, testified that he learned of the defendant's plan to "escape his brother" from the defendant before the killing when the defendant attempted to buy a car and borrow a gun from Simmons for this purpose. Alseen Lanier testified that at her home during the night following the killing of Deputy Litch, John Glenn admitted to her that he perpetrated the shooting of Deputy Litch. Michael Pippin testified that Glenn and his half-brother, Robert, left a shotgun at Pippin's house the same afternoon after the shooting. Pippin also stated that Glenn left a car at the Pippin residence. The car matched the description of the vehicle Glenn had borrowed that morning and matched the description of the car determined to have been involved at the scene of the killing. A set of coveralls similar to those worn by the Mahoning County jail inmates was found in the car left by Glenn at the Pippin residence. Deposits, which were consistent with gunshot residue, were detected on appellant's hands and clothing.
>
> Various qualified detectives and criminologists also testified at trial. These witnesses stated that

particles consistent with a plaster cast were found in the vehicle abandoned by Glenn on the floor of the front seat passenger side. Blood samples from the victim's body were matched with the blood scrapings taken from this case, and were found to be of the same blood grouping type. The wadding removed from the deputy's body was consistent with that found in a Remington 12 gauge number five shot shell. The weapon found in the Glenn car was a 12 gauge number five shot shell. The weapon found in the Glenn car was a 12 gauge sawed-off shotgun with one spent Remington number five shot shell still in the chamber.

The Ohio Supreme Court also summarized the evidence as follows:

In the present case, the difficulty of scientifically ascertaining the exact murder weapon is pronounced since shotgun pellets do not receive rifling marks as they travel down the usually smooth bore of a shotgun barrel. Consequently, circumstantial evidence must be relied upon if a particular shotgun is to be identified as the murder weapon. The same problem occurs when the license plates are removed from an auto prior to its use in the commission of a crime. Again, it is circumstantial proof that ordinarily connects such vehicle to the crime.

The case *sub judice* is replete with evidence not only indicating which particular shotgun was utilized, but also that appellant fired the weapon while at the scene of this crime and while utilizing the auto used in the crime. There was testimony which placed a particular sawed-off shotgun in appellant's custody at the time of the killing. This same weapon was scientifically determined to have been fired recently. Furthermore, appellant left this weapon at the home of Michael Pippin the evening of the date on which the

crime was committed. Expert analysis also concluded that appellant had recently fired a gun. When discovered, the shotgun contained a spent shell. The shotgun pellets taken from the victim's body were of the same size and weight as those normally contained in the kind of shotgun shell fired from such a shotgun.

The auto of which appellant had custody during the time of the murder was found to have particles of blood and flesh on the driver's side door. Expert testimony established a near match between those particles of blood taken from the door and blood samples taken from the victim. The ultimate description of the vehicle which struck Deputy Litch's patrol car as transmitted by police dispatchers was consistent with the description given by eyewitnesses, and matched that of the car appellant was driving the day in question. Various descriptions of the occupants of the car and their attire also coincided with that of appellant and his half-brother, Robert.

Appellant spoke with two witnesses concerning his plans to effectuate Robert's escape. Otis Simmons, one of these witnesses, testified that appellant told him of the plan to "escape his brother." This conversation occurred before the killing, at which time the defendant attempted to buy a car and borrow a gun from Simmons for this purpose. Alseen Lanier testified that John Glenn admitted to her that he perpetrated the shooting of Deputy Litch. Michael Pippin testified that Glenn and Robert left a shotgun wrapped in a towel at Pippin's house the afternoon of the shooting. Pippin also stated that Glenn left the car in question at the Pippin residence.

The vehicle which Glenn had borrowed that morning matched the description of the car observed to have been involved at the scene of the killing. A pair of coveralls similar to those worn by Mahoning County Jail inmates was

found in the car left by Glenn at the Pippin residence. Particles consistent with the plaster cast which had been on Robert Glenn's leg were found in the vehicle abandoned by him on the floor of the front passenger's seat.

In the face of the summaries of the two courts, the petitioner argues that there is no single piece of evidence that directly placed the murder weapon in his hands. In that context, the petitioner contends that three other defendants were charged "with this offense" but that the petitioner was the only person indicted for capital murder. Petitioner argues that the testimony of the two witnesses, Otis Simmons[21] and Alseen Lanier,[22] who related incriminating admissions of the petitioner, was suspect because of police pressures that prompted the relating of the admissions.

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[21]Simmons testified that he was contacted by the defendant on October 22, 1981 and that the defendant indicated that he needed a car and a gun and that he intended to "escape" his brother from jail. Simmons also indicated that on an earlier occasion the defendant had mentioned to him that he possessed a sawed off shotgun. (*See* Transcript pp. 1434-1464).

[22]The testimony of Lanier is found at pp. 1732 through 1746 of the transcript. She testified that she was a friend of the petitioner and that he came to her home on the evening of the day of the fatal shooting, October 22, 1981. She testified that he arrived at approximately 11:20 PM, went into the kitchen. Then, as she related, he indicated that he wanted to leave town because he was in trouble with the police because they thought he killed the cop. Tr. p. 1735. She testified that she then asked him if it was true as to whether he had done it and he said "yes," and told her to keep it a secret. Tr. 1736, 1737.

The *Jackson* standard of review does not permit the Court to make its own subjective determination of guilt or innocence. Equally important in the context of the *Jackson* argument advanced by the petitioner, the Court has neither the duty nor the right to weigh the credibility of the witnesses Simmons and Lanier. *Walker v. Engle*, 703 F.2d 959, 969 (6th Cir. 1983). It was for the jury to determine their credibility and their testimony, coupled with the other testimony fairly summarized by the two Ohio appellate courts, strongly supports the conviction of aggravated murder and petitioner's contention that no rational trier of fact could have found proof beyond a reasonable doubt is patently without merit.

The twenty-third ground for relief is denied.

D. Ground Twenty Four and Twenty Five

The primary thrust of these two grounds is that the "scientific evidence" presented by the prosecution was suspect and should have been challenged. Specifically, the petitioner points to the testimony regarding the plaster cast residue, the victim's blood match, the lead on the petitioner's jacket and the atomic absorption test. The petitioner advances the argument that his trial counsel should have had available to him appointed experts who could have counseled defense counsel for the purpose of a competent cross examination of the state's experts or in alternative to testify for the petitioner in a manner contrary to the opinions expressed by the state's witnesses.

The petitioner fails to advance any support for the proposition that the "scientific evidence" was suspect or that the cross-examination of the state's experts was deficient. Rather the petitioner advances what appears to this Court to be a *per se* argument to the effect that where the state has

available physical evidence that lends itself to expert opinion that might be considered by the trier of fact to be incriminating, it constitutes a constitutional violation for the state to not *sua sponte* provide the indigent defendant access to a "defense" expert for the purpose of either counseling with the defense lawyer or alternatively to testify. No authority is cited for that proposition nor does this Court find any authority. Thus the twenty-fourth ground for relief is denied.

Alternatively, the petitioner as a primary focus of the argument that he was denied the effective assistance of counsel at trial as set forth in Ground Twenty-five contends that his trial counsel should have sought the assistance of appointed scientific experts in the areas that the state produced expert testimony and that his failure to do so constituted a denial of the effective assistance of counsel. The ineffective assistance of counsel claim with respect to the failure to seek experts to combat the "scientific evidence" must be scrutinized against the *Strickland v. Washington*, 466 U.S. 668 (1984) two step analysis. If the Court were to assume that the failure of the petitioner's counsel to seek expert testimony assistance resulted in a seriously deficient performance, there is no evidence before the Court to justify that the performance prejudiced the petitioner.[23]

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[23]By way of contrast, the lengthy hearing in the state post conviction stage of these proceedings produced considerable testimony on the subject of the petitioner's mental condition and the testimony that was available on that subject. But no challenge was raised by scientific experts to challenge the state's experts on the issues relating to the plaster cast residue, the victim's blood match, the lead on the petitioner's jacket or the atomic absorption test.

The Court has reviewed the other claims of the denial of effective assistance of counsel during the guilt phase of the trial and finds that none of the claims survive the *Strickland* analysis and ground twenty-five is denied.

E. Ground Twenty Six

In his twenty-sixth (26) ground for relief, petitioner claims that the aggravating factor upon which the jury recommended the death penalty, the murder of a "peace officer," was unconstitutionally vague, as applied to him, and deprived him of his rights under the Eighth and Fourteenth Amendments. Petitioner's twenty sixth claim lacks merit.

It is axiomatic that aggravating circumstances must be sufficiently narrow to insure that the death penalty is not applied in an arbitrary fashion, and that "valid penlogical [sic] reason[s] underlie the selection 'from among the many criminal defendants [of] the few who are sentenced to death.'" *Beam v. Paskett*, 966 F.2d 1563, 1570 (9th Cir. 1992), *quoting Spaziano v. Florida*, 468 U.S. 447, 460 n. 7 (1984). *See also Maynard v. Cartwright*, 486 U.S. 356, 362 (1987); *Gregg v. Georgia*, 428 U.S. 153, 189 (1975); and *Godfrey v. Georgia*, 466 U.S. 420, 422 (1980).

Thus, to survive scrutiny under the Eighth Amendment, an aggravating circumstance must provide a "person of ordinary sensibility" with the guidance necessary to determine which defendant should receive the death sentence in light of the prohibition against cruel and unusual punishment. It is under these restraints that the Court must examine the statutory aggravating circumstance in question.

Section 2929.04(7), the aggravating circumstance found by petitioner's jury, states that a death sentence may be imposed upon following a murder conviction if:

> The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

At the time of the murder, the term "peace officer" was defined in the Revised Code [24] at O.R.C. §2935.01(B) as follows:

> a sheriff, deputy sheriff, marshal, deputy marshal, member of the organized police department of a municipal corporation in an adjoining state serving in Ohio under a contract pursuant to section 737.04 of the Revised Code, state university law enforcement officer appointed under section 3345.04 of the Revised Code, a police constable of any township, and, for the purpose of arrests within those areas, and for the purposes of Chapter 5503 of the revised Code, and the filing of and service of process relating to those offenses witnessed or investigated by them, includes the superintendent and patrolmen of the state highway patrol.

Petitioner argues that the victim was a volunteer deputy sheriff, and that since the definition of peace officer at §2935.01(B) did not include a volunteer deputy sheriff at the time of the murder, the aggravating circumstance was

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[24]This section was amended twice after the date of the incidence, the most recent amendment became effective as of September 17, 1991.

unconstitutionally vague as applied to him.[25] This argument is without merit.

In reviewing a sentencer's application of an aggravating circumstance to a particular case, a federal court is to apply the "rational factfinder" standard. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1989). *See Jackson v. Virginia*, 433 U.S. 307 (1979). The reviewing court must consider whether any rational factfinder could find the existence of an aggravating circumstance beyond a reasonable doubt. *Jeffers, supra* at 781-783. "A state court's finding of an aggravating circumstance in a particular case...is arbitrary and capricious if and only if no reasonable sentencer could have so concluded." *Jeffers* at 783.

Applying the *rational factfinder* standard to the facts in this case, the Court holds that a rational factfinder could have found that respondent knew that the victim was a peace officer, and that the victim was, at the time of the killing, engaged in his duties as a peace officer. Officer Litch was driving a clearly marked sheriff's cruiser, and was wearing a traditional police uniform at the time of the killing. The fact that the victim was a volunteer, is not a fact that a rational factfinder would find materially relevant to reaching a conclusion as to whether the statute should apply to petitioner.

While §2935.01(B) does not specifically state that a

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[25]Petitioner does not challenge the facial validity of the aggravating circumstance. Prior courts have upheld the constitutionality of aggravating circumstances materially similar to the one in question in the present case. *See Godfrey v. Georgia*, 446 U.S. at 423 (n.2) (1980).

volunteer deputy sheriff is considered a peace officer under the Ohio Revised Code, it does not rule out that interpretation. The statute specifically states that "'a peace officer' includes a sheriff, deputy sheriff...". The very structure of the statute, and especially the use of the word "*includes*" demonstrates that the list is not exhaustive, and supports a finding that a volunteer deputy sheriff qualifies as a peace officer.

Further, a rational factfinder could conclude that such an interpretation would be consistent with the apparent purpose of §2929.04(7), namely to protect those performing vital police functions. Section 2929.04(7) makes no mention of the status of the peace officer or his salary, but emphasizes the importance of whether he was engaged in his duties as an officer at the time of the killing. Most citizens recognize that police officers, volunteer or paid, often face dangerous, and sometimes life threatening, situations. A rational juror might well have determined that the relevant inquiry was not whether the victim was being paid for his services, but whether the officer was in a dangerous situation for which the statute was adopted; as such a statutory provision might serve to deter others from endangering the lives of officers in their investigation of criminal activity. Finding that a rational sentencer could have found evidence supporting the aggravating circumstance of killing a peace officer, the Court holds that the aggravating circumstance was not unconstitutionally vague as applied to petitioner. Petitioner's twenty sixth (26) ground for relief is denied.

VIII. THE COURT'S RULING ON THE PETITIONER'S GROUNDS THAT RELATE TO THE SENTENCING PHASE OF HIS TRIAL.

A. Ground One

In petitioner's first assignment of error, he alleges that he was denied the effective assistance of counsel for the sentencing phase of plaintiff's capital trial.

In this case, the petitioner's attack on his counsel is anchored in a claim, advanced during the evidentiary hearing conducted in response to the petitioner's state action for post conviction relief, that his trial counsel failed to conduct an adequate investigation prior to the sentencing hearing in preparation for establishing the mitigating factor set forth in O.R.C. 2929.04(B)(3) which provides:

> (3) Whether, at the time of committing the offense the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The petitioner claims that a more thorough pretrial factual investigation by his trial counsel, concentrated on interviews of his brothers and sisters, would have revealed that he had lived under very difficult home conditions, that he probably suffered a prenatal injury, and those facts, coupled with his history of banging his head and bed wetting, would have aided in the development of medical testimony at the sentence hearing so as to demonstrate that the petitioner suffered from global brain injury. Petitioner claims that such a factual presentation, coupled with the type of medical testimony presented during the post conviction evidentiary hearing, would have led the jury to the finding of an O.R.C. §2929.04(B)(3) mitigation factor that would have outweighed the aggravating circumstance and thus resulted in a life sentence.

Federal habeas review of capital sentences often focus on the ineffective assistance of counsel claim as it pertains to the sentencing phase of the case.[26] The judicial analysis is guided by *Strickland v. Washington*, 466 U.S. 668 (1984). In that habeas capital case, the court set forth the following principles for evaluating a claim of ineffective assistance of counsel:

> 1. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, ... that counsel's role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Id. at 686, 87 (citations omitted).

> 2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First, the defendant must show that counsel's performance was deficient.* ... Second, *the defendant must show that the deficient performance prejudiced the defense.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said

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[26] *See,e.g., Burger v. Kemp*, 483 U.S. 776 (1987); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) and *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

> that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

> 3. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Id. at 688.

> 4. *Judicial scrutiny of counsel's performance must be highly deferential*....A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citation omitted).

> 5. [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable*

investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690, 91.

6. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.

Id. at 691.

7. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*

Id. at 694.

8. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

...[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Id. at 695.

9. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, *a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies*. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697.

10. Since fundamental fairness is the central concern of the writ of habeas corpus, see *id.*, at 126, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 697, 98.

11. [I]n a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. §2254(d).

Id. at 698 (emphasis added).

> 12. [B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Id. at 698.

The ninth principle of a *Strickland* review suggests that if it is deemed appropriate to dispose of an ineffectiveness claim on the issue of prejudice, the court should do so. The court will follow that admonition.[27]

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[27]The issue of whether the performance of petitioner's counsel passes muster is difficult in this case. On the one hand petitioner's counsel had the early report of Dr. Nalluri that the petitioner was competent to stand trial and did not suffer from schizophrenia, organic mental disorder or affect disorder which would support an insanity defense. On the other hand the report alerted petitioner's counsel to the fact that the petitioner had a history of hyperactivity, possessed borderline intellectual functioning, was beaten with boards by family members and had wet the bed until he was eleven years old. Notwithstanding the possibility of developing testimony that would arguably support an O.R.C. 2929.04(B)(3) mitigating factor, petitioner's counsel did not conduct interviews, seek out records or apparently do anything else in preparation for a possible sentencing hearing until after the petitioner's guilt phase of the trial was complete. After the guilt phase, counsel for the petitioner requested that both a presentence investigation and a mental examination be completed pursuant to the provisions of O.R.C. §2923.03(D)(1). This statutory provision mandates that copies of such reports be furnished to the jury. Two doctors, Drs. Siddall and Ramani, were appointed by the court to conduct a mental examination and their reports were furnished to the jury. At the sentencing hearing, petitioner's counsel called four witnesses. Two testified about earlier contacts with the petitioner when he was younger. One witness unsuccessfully

In addressing the prejudice issue, *Strickland* teaches that the court must consider the totality of the evidence before the jury. This the court has done and concludes that if the testimony as presented by the petitioner during the post conviction evidentiary hearing [28] had been presented to the

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attempted to offer his opinions about the wisdom of capital punishment and the fourth witness opined that the petitioner did not have a significant criminal records [sic] in the context of the mitigation factor set forth in §2929.04(B)(5). In addition to the four witnesses, petitioner's counsel attempted to offer a videotape showing the area where the defendant lived and the interviews of both the defendant's mother and a former employer. The prosecution objected to the introduction of the videotape because of its assertion that it was denied the opportunity to cross examine the defendant's mother and former employer if the videotape was displayed to the jury. The trial court sustained the prosecution's motion, so the jury did not view the videotape. The defendant offered an unsworn statement to the jury as he was permitted to do under the provisions of §2923.03(D)(1). The defendant denied any responsibility for Litch's killing. In the sentencing argument to the jury, petitioner's counsel stressed the petitioner's youth, his alleged lack of a significant history of prior criminal convictions and delinquency adjudication and engaged in a condemnation of death sentences.

[28] At the post-conviction hearing, present counsel offered the deposition testimony of two psychologists and live testimony of yet another psychologist who each attested to petitioner's severe mental disabilities. Dr. James Tanley, a clinical psychologist and neuropsychologist testified that he performed numerous tests on the petitioner including the Bender Gestalt Test, which measures gross visual motor skills. He testified that petitioner exhibited only borderline intelligence and that he suffered from organic brain damage.

Dr. Tanley hypothesized that petitioner's brain damage could have been the result of "pre-natal insult" when his mother

was given a local anesthesia during an operation she underwent in her first trimester of pregnancy with petitioner. Dr. Tanley testified that there was also evidence that petitioner had been hit in the head with brick when he was an infant, and that this head trauma could also have caused the brain defect.

Dr. Tanley also indicated that the psychiatrist and the clinical psychologist, Dr. Ramani and Dr. Siddall, were not given all of the information necessary to make an informed decision. Dr. Tanley notes that Drs. Siddall and Ramani were not aware of petitioner's mother's surgery while she was pregnant with petitioner and argued that the doctors also did not have the opportunity to examine mental heath evaluations petitioner had received when he was in his early teens. Those evaluations prepared by The Diagnostic and Evaluation Clinic indicated that petitioner was mild to borderline mentally regarded, and that he was learning disabled.

Dr. Tanley also argued that absent from the information given to Drs. Ramani and Siddall was petitioner's family background, which included a history of alcoholism and abuse; as well as petitioner's tendencies of rocking himself to sleep by banging his head on his bed. Dr. Tanley testified that had Drs. Ramani and Siddall been aware of this information they would have arrived at the same decision that he espoused, namely that petitioner suffered from global brain damage.

Dr. Henry Leland, Professor of Psychology at Ohio State University similarly testified in his deposition that petitioner was developmentally disabled. He indicated that such a diagnosis was consistent with the evidence that he was provided including affidavits of family members and school teachers, school records, and reports from the diagnostic clinic petitioner attended when he was approximately thirteen years old. Dr. Leland agreed with Dr. Tanley's conclusion that if Drs. Siddall and Ramani had been provided this information, they, too, would have also concluded that petitioner was brain damaged.

In addition to the two videotaped depositions entered into evidence, petitioner also offered the live testimony of Dr. James Eisenberg, a clinical psychologist. Dr. Eisenberg, who had

jury during the sentencing phase of the case, there is not a reasonable probability that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Initially, the court observes that assuming the sentencing jury read the reports of Drs. Ramani and Siddall, they would have learned that the petitioner was "somewhat retarded," functioned in the borderline range of intelligence, suffered from low self esteem and had received counseling at a mental health center at the age of fifteen.

More importantly, the nature of the crime needs to be examined in the context of the claim that the petitioner suffered from a mental disease or defect. In order to establish a mitigating factor under Section 2929.04(B)(3), the petitioner is required to establish that the mental disease or defect resulted in the petitioner lacking in substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. In this case the crime was not spontaneous. It was not the result of a sudden

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previously testified as an expert witness in ten capital cases, and who had the opportunity to interview the petitioner, testified that petitioner suffered from neurological, and attention deficit disorder, and possessed an IQ of 71, placing him in the bottom two percentile of the population.

The doctor noted that in reaching his opinion, he relied substantially on evidence not made available to Drs. Siddall and Ramani including: school and medical records, information regarding the petitioner's family background, and the evaluations from petitioner's counseling sessions that he participated in during his early teens. Dr. Eisenberg emphasized the importance of learning as much as possible about the subject before writing an evaluation, and noted that ten days is generally an insufficient amount of time in which to perform an evaluation for use in a mitigation hearing.

unexpected confrontation. Rather, it was the product of a well thought out plan to bring about the successful escape of his brother from the custody of the sheriff. The petitioner had to plan and successfully carry out the interception of the sheriff's cruiser transporting his brother to the hospital, disable the sheriff's cruiser, and successfully conclude the inevitable confrontation with the deputy sheriff that would follow the disabling of the vehicle. For this inevitable confrontation, the petitioner armed himself with a loaded sawed off shotgun which he then used to complete the anticipated confrontation. In effect, the petitioner eliminated the one certain witness to the escape by the summary execution and then made good the escape. His subsequent conversation with Alseen Lanier demonstrated his awareness of the seriousness of his conduct. In sum, the court concludes that if the petitioner's trial counsel had produced the additional evidence as presented during the post conviction evidentiary hearing there is not a reasonable probability that a different sentence recommendation would have been forthcoming from the jury. Consequently, the Court finds that petitioner has failed to establish the second requirement established by *Strickland* and thus, the first ground is denied.

B. Ground Two

In his second ground for relief, petitioner claims that the death sentence he received violated his rights under the Eighth and Fourteenth Amendments to the Constitution because the verdict rests on a determination made by jurors who were led to believe that the responsibility for determining the appropriateness of the death sentence lay with the trial court. During voir dire, the prosecutors informed approximately two dozen prospective jurors that, under Ohio law, a sentence of death returned by a jury is only a recommendation to the trial court who may chose to

override the jury's verdict and impose one of the available life sentences. *See* O.R.C. §2929.03(D)(2), (3).

The voir dire of Rose Lantagne, who was seated on petitioner's jury, is illustrative of the remarks made to members of petitioner's panel.

> Q. Now, in that event that the jury should decide that the death penalty may be appropriate, that would be the recommendation they make, all right?
>
> A. (Nods head affirmatively.)
>
> Q. Having made that recommendation doesn't necessarily [sic]
> mean [*sic*]
> the judge would follow that recommendation or that it would ever actually be carried out.
>
> A. Yes.
>
> Q. Does that help you at all?
>
> A. Yes.
>
> Q. Does it?
>
> A. Yes.

(Tr. 685). The prosecutor again reminded the jury in his closing argument that their sentence was a recommendation to the trial court.

Petitioner argues that by emphasizing the recommendation aspect of the sentencing phase, the prosecution was able to "minimize the jurors' sense of

responsibility for a death verdict in John's case." (Petition at 33). Petitioner, in arguing that such remarks denied him a fair trial, relies heavily on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court reversed the defendant's death sentence after the prosecutor had informed the jury that their sentence would be reviewed by the state Supreme Court. The Court found that such a remark tended to relieve the jurors of the responsibility of imposing sentence, and held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* At 328-329.

The prosecutor's conduct did not violate *Caldwell* because the prosecutor correctly stated Ohio law. Ohio Revised Code §2929.03(D)(2) provides:

> If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.
>
> (3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(2) of this section of the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three

> judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or panel shall impose one of the following sentences on the offender:
>
> (a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;
>
> (b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

In order to make out a *Caldwell* violation, petitioner must show that the prosecutor's remarks did not accurately reflect the law, or the "role assigned to the jury by the local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1985). *See also Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990). Courts since *Caldwell* have consistently held that in order to make out a *Caldwell* violation, there must be some showing of "misstatement" or "misconduct." *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir. 1988), *cert. denied* 489 U.S. 1071 (1989). "[E]mphasizing the 'advisory' role of the jury, or the fact that the jury is to make a 'recommendation to the judge, does not support a *Caldwell* claim." *Id.* at 1473.

In the present case, the prosecutors accurately relayed the state of Ohio death penalty law. As the prosecutor noted, the jury's finding of death is merely a recommendation which the trial judge may accept or reject.[29] Even if it was the

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[29]The trial court may disregard the jury's recommendation of death and impose one of two available life sentences. However, the trial court is bound by a jury's finding of life. O.R.C. § 2929.03(D)(2), (3).

prosecution's intent to shift, in the jurors' minds, the responsibility for imposing death, the remarks, themselves, were consistent with Ohio death penalty law, and do not amount to a *Caldwell* violation.

Further, the prosecution's comments made during closing arguments served to correct any prejudice that might have occurred as the result of earlier remarks regarding the recommendation aspect of Ohio death penalty law. While the prosecution reminded the jury in closing arguments that their sentence was merely a recommendation, it was stressed that it was "an important recommendation" and that the jury should "consider very seriously and consider very heavily" their recommendation.[30]

C. Ground Four

In his fourth ground for relief, petitioner claims that the trial court erred in refusing to strike the final paragraph in the report of Dr. Ramani, a psychiatrist, which was

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[30]Petitioner argues that the jury was misinformed about the law in Ohio because while their sentence is technically a recommendation, in reality it is a final judgment because trial court's rarely override a jury's death sentence. In support of his position, petitioner relies on *United States v. Jackson*, 390 U.S. 570 (1967), wherein the defendant was charged with violating the Federal Kidnapping Act. In holding that the prosecutor impermissibly shifted the responsibility of sentence, the *Jackson* Court noted that in the thirty-four (34) years that the Act has been in effect, a trial court has never overridden a jury verdict/sentence. *Jackson* is inapplicable to the present case, however, because the Federal Kidnapping Act does not provide for a judicial override, and the Court was merely noting that no reasonable interpretation of the statute could include one. The very language of Ohio's death penalty statute, however, states that the trial court may override a jury's death sentence.

submitted to the jury during the sentencing phase.

O.R.C. § 2929.03(D)(1) provides that a pre-sentence investigation and/or a mental examination of the defendant shall not be made except upon request of the defendant. If the request is made, the statutory provision provides that copies of the reports shall be furnished to the jury. In this case, defendant requested both a pre-sentence investigation and a mental examination. The court appointed Dr. Ramani, a psychiatrist, and Dr. Siddall, a clinical psychologist, to prepare the requested reports.

Dr. Ramani's brief report is attached as Appendix B and Dr. Siddall's report is attached as Appendix C.

Dr. Ramani's report states in part as follows:

> On Examination: Patient was well dressed and groomed, reliable, pleasant, cooperative and open. He was in good contact, with no evidence of acute or overt psychosis. He was well oriented X3. His cognitive functions including remote and recent memory were intact. His jugement [sic] had been adequate to his life style, to the extent he worked in a body shop and was developing his boxing skills. He is somewhat retarded (Repoted [sic] IQ in 75 percentile). but this doesn't appear to be severe enough to impair his judgment or his capacity to manage his day very well.
>
> In summary, within reasonable medical certainty, I do not see any imtigating [sic] circumstances in this particualr [sic] individual.

Dr. Siddall's report is labeled "*PSYCHOLOGICAL EVALUATION*" and describes the results of a number of tests given to petitioner, including three forms of the Ammons

Quick Test, the Aphasia Screening Test, the Minnesota Multiphasic Personality Inventory, and the Rotter Incomplete Sentences Blank test.

Under the heading "*SUMMARY AND RECOMMENDATION*," Dr. Siddall wrote:

> The interview and psychological testing indicates that John Glenn has adequate psychological functioning for a meaningful participation in his own trial. In an unsophisticated manner he is knowledgeable of the charges against him and the possible penalties. In addition, he understands the roles of various court personnel including defendant, judge, jury, and prosecutor. He has adequate intelligence and emotional stability to counsel in his own defense. Therefore, it is my opinion that he is competent to stand trial.
>
> Regarding the question of mitigating circumstances, it is not possible to determine a great deal from Mr. Glenn's self-report as he vehemently denies being involved. However, the circumstances of this case, as portrayed in the documents of investigation, do suggest that Mr. Glenn knew the victim of the offense was a law enforcement officer engaged in his duties at the time of the offense. Circumstances also suggest that it was his specific purpose to kill this officer, but it seems very doubtful that the victim induced or facilitated the offense. Similarly, there is no suggestion that Mr. Glenn was under unusual duress, coercion, or strong provocation, in fact, the circumstances do suggest that the crime was carefully planned and carried out.

The specific objection raised by Ground Four was the refusal of the trial court, upon motion of petitioner's trial counsel, to strike the concluding sentence in Dr. Ramani's

report in which he declared "within reasonable medical certainty, I do not see any imtigating [sic] circumstances in this particualr [sic] individual." Dr. Ramani's report went to the jury with the above quoted language.

Petitioner claims that Dr. Ramani's conclusion that there were no mitigating circumstances was improper because it was a legal conclusion that was strictly for the jury to make. Petitioner raised this claim at the state court level where it was rejected by the Ohio Supreme Court. In passing on the claim, the court found that Dr. Ramani's conclusion was a medical and not a legal one. Specifically, the Ohio Supreme Court held that:

> The psychiatric evaluation prepared for the mitigation phase concluded with the sentence: 'In summary, within reasonable medical certainty, I do not see any imtigating [sic] circumstances in this particualr [sic] individual.' This conclusion followed immediately after the medical examination paragraph. Appellant contends that the above statement constituted an unpermitted conclusion that there existed no mitigating circumstances. However, it is most apparent from the context of the statement, as well as the doctor's inclusion of the phrase 'medical certainty,' that the conclusion was intended to go no further than the mitigating circumstances of a psychiatric nature.

State v. Glenn, 28 Ohio St. 3d at 459.

A thorough examination of the transcript of the sentencing phase of the new trial (*see* Tr. 2865 - 3055) demonstrates that neither the court nor any of the lawyers called the jury's attention to the opinion stated by Dr. Ramani on the issue of a mitigating circumstance. During final argument, opposing counsel argued strenuously on the

issue of whether the petitioner had established as a mitigating factor the "lack of a significant history of prior criminal convictions and delinquency adjudications." *See* O.R.C. § 2929.04(B)(5). The Prosecuting Attorney of Mahoning County, in his argument to the jury, conceded that the mitigating factor of the youth of the offender (*see* O.R.C. § 2929.04(B)(4) had been established, but that it was outweighed by the aggravating circumstance.)

Counsel for the petitioner correctly point out that an expert witness may not testify as to his *legal* opinion regarding the defendants' criminal liability. *Shahid v. City of Detroit*, 889 F.2d 1543 (6th Cir. 1989); *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984); and *United States v. Avarello*, 592 F.2d 1339 (5th Cir. 1979).

However, upon a careful review of the brief report of Dr. Ramani together with the absence of any attempt by the prosecution to treat the Ramani opinion as a legal opinion, the Court concurs with the analysis of Justice Robert Holmes of the Ohio Supreme Court and denies the Fourth Ground for relief.

D. Ground Five

In his fifth ground for relief, petitioner claims that his sixth amendment constitutional rights were denied by the trial court's overemphasis of the pre-sentence report and the mental evaluations prepared by Dr. Ramani and Dr. Siddall, the state's psychiatrists. Petitioner's claim is without merit.

At the beginning of the sentencing phase, the trial court presented each juror with a "special packet" containing the above-mentioned reports, a note pad and pencil. The jurors were instructed that they may make notations on the reports if any witnesses made reference to the reports. The court

also noted that the reports were confidential and would have to be returned to the court before they were dismissed from duty. The court again made reference to the "confidentiality" of the report when he asked the alternate jurors to return the reports at the conclusion of the sentencing hearing.

Petitioner claims that the trial court overemphasized the importance of the pre-sentence report and mental evaluations by placing them in packet for the jurors and then, on two separate occasions, alerting the jurors that, due to the confidential nature of the document, they would have to return the documents at the conclusion of their service.

Petitioner alleges that this overemphasis was especially prejudicial in light of the fact that no one ever testified with regards to the reports, the reports were never marked as exhibits or admitted into evidence, and that the court did not instruct the jury as to how the reports were to be evaluated and weighed.[31]

Petitioner argues that this "lessened the jurors' sense of responsibility to exercise their own independent judgment with respect to the findings in the reports. The trial court's actions encouraged unthinking acceptance of these devastating reports . . . ." (Petitioner's Traverse at 52).

Petitioner argues that the trial court's treatment of the reports and the trial courts subsequent decision to allow the jury to retain the reports during deliberations violated Ohio Revised Code § 2945.35, which provides:

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[31]In fact, petitioner notes that the trial court failed to mention the presentence report or the mental evaluations in his charge.

> Upon retiring for deliberation, the jury, at the discretion of the court, may take with it all papers except depositions, and all articles, photographs, and maps which have been offered in evidence. *No article or paper identified but not admitted in evidence shall be taken by the jury upon its retirement.*

(Emphasis added).

Such a claim, however, fails under Ohio law. Section 2929.03(D)(1) states that at the conclusion of the guilt phase, a pre-sentence investigation and mental evaluation will be conducted at the request of defense counsel, and reports will be prepared at the State's expense. Specifically the statute provides:

> When death may be imposed as a penalty, the court, *upon the request of the defendant*, shall require a presentence investigation to be made and, *upon the request of the defendant*, shall require a mental examination to be made, and shall require the reports of the investigation and of any mental examination submitted to the court, pursuant to Section 2947.06 of the Revised Code....A pre-sentence investigation or mental examination shall not be made *except upon request of the defendant*. Copies of any reports prepared under this division *shall be furnished to the court, to the trial jury if the offender was tried by a jury* . . . .

O.R.C. § 2929.03(D)(1) (emphasis added).

As is evident from the statute itself, such reports are to be prepared only upon the request of the defendant or his counsel, and once requested, the trial court *must* present the reports to the jury. Thus, it was petitioner, through his

counsel, that caused the reports to be placed before the jury. The trial court's references to the reports were made for administrative purposes only and did not in any way place undue emphasis upon them.

Absent any constitutional error, petitioner's fifth ground for relief is denied.

E. Ground Six

Petitioner claims, in his sixth ground for relief, that his death sentence was based on unreliable and materially inaccurate mental evaluations which denied him a fair and reliable sentencing, effective assistance of counsel, and due process of law. Petitioner argues that the mental evaluations were inaccurate and inadequate because the doctors had insufficient time to complete the reports, and that the doctors did not consider relevant information regarding petitioner's family history and the counseling he received in middle school. Further, he argues that his trial counsel was ineffective for failing to provide Drs. Ramani and Siddall with any information regarding petitioner's background.

Petitioner's claim that his trial counsel was ineffective has been thoroughly addressed in petitioner's first ground for relief, *supra*, and will not be addressed here. At this juncture, the Court will examine the reports, themselves, to determine if they were constitutionally adequate.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that a defendant who has made a colorable claim of insanity is entitled to a court appointed psychiatrist for the purpose of evaluation and diagnosis to be used as a part of an insanity defense. The *Ake* Court noted the importance of providing the defendant with expert psychiatric assistance when mental illness is an issue. In *Blake v. Kemp*, 758 F.2d

523 (11th Cir. 1985), relying on *Ake*, the Court held that a defendant raising a colorable claim of insanity has a constitutional right to:

> at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information... .

Id. at 529. The reasoning in *Ake* finds application in the penalty phase of death penalty cases as well.

In support of his argument that the evaluations were flawed, petitioner notes that the sentencing hearing was scheduled to begin only nine (9) days after the jury returned their verdict.[32] Petitioner argues that this time was insufficient to enable the doctors to produce reliable reports. The fact that the doctors had a short amount of time in which to prepare their evaluations does not render their evaluations unconstitutionally defective. Petitioner has cited no authority which holds that a short preparation time, alone, is sufficient to render the report unreliable. Further, the Court notes that the doctors asked the trial court for, and received, two additional days in which to complete their reports.

Petitioner also argues that the reports were flawed because the doctors were not provided with sufficient information regarding petitioner's troubled family and social background. As was indicated in the reports, however, both doctors, Dr. Ramani and Dr. Siddall, interviewed petitioner

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[32]The jurors returned for the sentencing phase as ordered on August 30, 1982. However, the mental examination reports were not completed and so, upon motion of petitioner's counsel, the sentencing hearing was continued until September 1, 1982. On that date, reports had been completed and each juror was provided with a copy.

and obtained details regarding his personal history. The Court finds that the independent interviews by the psychiatrist and the clinical psychologist were sufficient to insure the required statutory mental evaluations.

In support of his argument that the reports were unreliable, petitioner notes that the subsequent reports prepared by doctors for purposes of the post-conviction hearing were strikingly different in their content and conclusions. Petitioner refers the Court to the deposition testimony of Dr. Leland and Dr. Tanley who both concluded that petitioner suffered from "global brain damage" and was substantially handicapped in his intellectual functioning.[33] Petitioner argues that had Drs. Ramani and Siddall had sufficient time to investigate petitioner's background, and conduct a thorough evaluation of petitioner, their reports would have more closely resembled those of the doctors petitioner relied upon at the post-conviction hearing.

In essence, petitioner is arguing that the initial mental reports were in error because those reports were in conflict with the subsequent reports. It is not the function of the courts to determine which doctors are "right." Doctors often arrive at different conclusions based on their own personal interpretations of relevant evaluations and test results. Under the Ohio statute, petitioner was not entitled to a psychiatric report which would necessarily be favorable to him. *See eg. Blake, supra* at 529. Since the evaluations of Drs. Ramani and Siddall were adequate under the law, petitioner was not denied due process merely because the reports are inconsistent with those filed by doctors at the post-conviction stage. The Court finds that the reports of Drs. Ramani and Siddall were not constitutionally inadequate or unreliable.

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[33]Dr. Eisenberg, a clinical psychologist, also testified that petitioner suffered from neurological impairment.

Petitioner's sixth ground for relief is denied.

F. Ground Nine

The ninth ground advanced by the petitioner contends that the trial court's refusal to give a requested instruction during the sentencing phase of the case violated the petitioner's eighth and fourteenth amendment rights. The proposed charge read as follows:

> I charge you, Ladies and Gentlemen of the jury, that if you see fit, *whether mitigating circumstances exist or not, you may recommend mercy for the defendant.* This recommendation is solely in your discretion and is not controlled by any rule of law. You may make such recommendation with or without a reason. (Emphasis added).

The requested instruction has roots in Ohio's constitutionally discredited procedure for determining whether capital punishment should be imposed. Prior to the adoption by the Ohio General Assembly of its revised criminal code.[34] which became effective on January 1, 1974, Ohio's homicide statutes dealt with first degree murder, second degree murder and manslaughter. First degree murder was punishable by death unless the jury or three judge panel found the defendant guilty, but found mercy. Mercy was in the exclusive province of the trier of fact, be

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[34]*See* Ohio Statutes 134 v H 511 which became effective January 1, 1974. House Bill 511 completely revamped Ohio's Criminal Code. The statutory provisions respecting aggravated murder and the sentencing provisions were next modified by legislation that became effective October 19, 1981. *See* Ohio Statutes 139 v S 1.

it a jury or three judge panel. Ohio did not have a bifurcated procedure that separated the guilt phase from the sentencing phase of the trial. Ohio has not carried out a death sentence since 1963 even though Ohio has constantly had a capital homicide statute in effect. The 1974 revision of the homicide statutes introduced for the first time the concept of aggravating circumstances calling for capital punishment and the offsetting concept of mitigating circumstances to negate a death sentence. Ohio's revision of its capital sentencing provisions appears to have been in direct response to *Furman v. Georgia*, 408 U.S. 238 (1972). However, the 1974 revision was found to be constitutionally infirm in *Lockett v. Ohio*, 438 U.S. 586 (1978). In reversing the capital sentence in *Lockett*, Chief Justice Burger declared:

> Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), every State that authorized capital punishment had abandoned mandatory death penalties, and instead permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case. . . .

This Court had never intimated prior to *Furman* that discretion in sentencing offended the Constitution. . . . .

The constitutional status of discretionary sentencing in capital cases changed abruptly, however, as a result of the separate opinions supporting the judgment in *Furman*. . . .

. . . .

Four years after *Furman*, we considered Eighth Amendment issues posed by five of the post-*Furman* death penalty statutes. Four Justices took the position that all five statutes complied with the Constitution; two Justices took the position that none of them complied. Hence, the disposition

of each case varied according to the votes of three Justices who delivered a joint opinion in each of the five cases upholding the constitutionality of the statutes of Georgia, Florida, and Texas, and holding those of North Carolina and Louisiana unconstitutional.

The joint opinion reasoned that, to comply with *Furman*, sentencing procedures should not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia, supra*, at 188. In the view of the three Justices, however, *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," 428 U.S., at 189, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." *Id.*, at 188. . . .

In the last decade, many of the States have been obliged to revised their death penalty statutes in response to the various opinions supporting the judgment in *Furman* and *Gregg* and its companion cases. The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; . . .

With that obligation in mind we turn to *Lockett's* attack on the Ohio statute. Essentially she contends that the Eighth and Fourteenth Amendments require that the sentencer be given a full opportunity to consider mitigating circumstances in capital cases and that the Ohio statute does not comply with that requirement. . . .

. . . .

Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in *Woodson*, after reviewing the historical repudiation of mandatory sentencing in capital cases, 428 U.S., at 289-298, concluded that

> "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304.

That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. *Id.*, at 305. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. . . .

. . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . .

. . . a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth

Amendments.

The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases. . . .

. . . . None of the statutes we sustained in *Gregg* and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

In this regard the statute now before us is significantly different. Once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following mitigating circumstances is established by a preponderance of the evidence:

> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the factor that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev. Code Ann. § 2929.04 (B) (1975).

. . . .

The limited range of mitigating circumstances which may

be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

Accordingly, the judgment under review is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings. (Emphasis added).

Id., at pp. 597-609.

The present capital homicide statute framework in Ohio has broadened the mitigating factors and concludes with the catchall phrase in O.R.C. § 2929.04(B)(7) which states:

> "Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

The 1972 decision in *Furman*, was followed by *Gregg v. Georgia*, 428 U.S. 153 (1976) in which a bifurcated guilt-sentencing procedure in Georgia was found to pass constitutional muster in terms of the Eighth Amendment. The decision of the Supreme Court was written by Justice Stewart and at page 199 of the opinion he declared:

> First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would

support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. *Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. (Emphasis added).

The petitioner seized on the reference to mercy in Justice Stewart's opinion as requiring that the requested instruction be given. The petitioner's argument is without merit. The commentary by Justice Stewart on the possibility that a defendant subject to a capital sentence will be accorded "mercy" somewhere during the process is not a judicial mandate requiring the trial court to instruct the jury as requested by petitioner's counsel. Ohio Rev. Code § 2929.04 which establishes the criteria for imposing death or imprisonment for a capital offense sets forth the mitigating circumstances in § 2929.04(B) and, in particular, subsection (7) provides for a consideration of "any other factors that are relevant to the issue of whether the offender should be sentenced to death." The O.R.C. § 2929.04(B)(7) is the

functional equivalent of mercy as that concept was identified by Justice Stewart. The ninth ground for relief is denied.

G. Ground Thirteen

In petitioner's thirteenth ground for relief, petitioner claims that the trial judge prevented the jurors from weighing and giving effect to relevant mitigating evidence at the penalty phase of the capital trial. Petitioner argues that in do [sic] so, the trial court violated his rights under the Eighth and Fourteenth Amendments.

During the penalty phase, petitioner sought to introduce into evidence three newspaper articles, the testimony of Reverend William Mosley, and a videotape. One of the newspaper articles addressed the fact that capital punishment is only imposed in a few cases of murder; a second article was about the story of a man who served sixteen years in prison before his innocence was proved; and the third article featured a story on a former sheriff's deputy who, although charged with murder and kidnapping, was not capitally indicted. Defense counsel also proffered the testimony of Reverend Mosley who was prepared to offer theological testimony supporting mercy.[35] Finally, petitioner sought to introduce a videotape which included conversations with petitioner's mother and former employer, and narration from a local television news personality. It is apparent from the record that trial counsel had hoped to use the videotape as the centerpiece of his mitigation defense.

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[35]The Reverend would have told the biblical story of Cain and Abel, where Cain was banished rather than sentenced to death for killing his brother.

A defendant in a capital case is given great latitude in presenting mitigating evidence. In *Lockett v. Ohio*, 438 U.S. 586, 604 (1977) the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

1. *The Newspaper Articles and the Testimony of Reverend Wells*

The trial court excluded the newspaper articles and the testimony of Reverend Wells because they did not relate to the appellant's character or the circumstances of the crime. In *McKoy v. North Carolina*, 494 U.S. 433, 440 (1989), the Supreme Court held that evidence is relevant for purposes of mitigation if it "'tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (citation omitted). The role of evidence of aggravating and mitigating circumstances in the penalty phase of a capital trial is to guide the jury in determining whether the particular defendant should be subjected to the death penalty. *McKleskey v. Kemp*, 481 U.S. 299 (1986). In *Lockett*, the Court stated that:

> [n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

438 U.S. at 604 (n. 12). Since the testimony of the newspaper articles and the testimony of Reverend Wells did not relate to the petitioner or his background, or the circumstances surrounding the offense, it was not relevant to

the issue of whether this particular defendant should receive the death penalty, and was, therefore, appropriately excluded.

2. *The Videotape*

The trial court also excluded the videotaped conversations of petitioner's mother and his former employer on the grounds that it was inadmissible hearsay. In upholding the exclusion of the tape, the Ohio Supreme Court noted that the testimony of the mother and former employer violated the rules of evidence because it was not under oath and was not subjected to cross-examination by the prosecution, thus, rendering it inherently unreliable. Further, the court found that petitioner had not demonstrated that the witnesses were unavailable to testify at the penalty hearing. The Court agrees that the videotape was properly excluded.

While a capital defendant is entitled to broad latitude in his presentation of mitigation evidence, the Constitution does not require that the rules of evidence be suspended. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Lockett, supra.* Petitioner argues, however, that, despite the rules of evidence governing the treatment of hearsay, the videotape should have been admitted. Petitioner relies on *Green v. Georgia*, 442 U.S. 95 (1979), wherein the Court held that an exculpatory hearsay statement made by a co-defendant was improperly excluded by the trial court. In so ruling, the Court noted that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 97 (citation omitted).

The testimony in *Green*, however, was far more reliable than that which was before the trial court in petitioner's case. In *Green*, the defendant sought to admit the testimony of a

third party who testified at the co-defendant's trial. Allegedly, the co-defendant told the declarant that he, and not the defendant, was responsible for the murder. The Supreme Court held that the evidence was "highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability," namely that there was sufficient evidence corroborating the confession, that it was made against penal interests, it was made spontaneously to a confidant, and that there was no reason for the co-defendant to make such a statement if it was not true.

In the present case, however, were no similar reasons to believe that the unsworn out of court statements of the mother and the former employer were reliable. Excluding such testimony, therefore, did not violate petitioner's constitutional rights.

H. Ground Fourteen.

In a related argument, petitioner claims in his fourteenth ground for relief that the trial judge gave no weight to relevant mitigating evidence. Specifically, petitioner asserts that the trial court failed to consider evidence of petitioner's youth at the time of the crime, his lack of significant criminal history, and his family and social background.

There is no doubt that under *Lockett v. Ohio*, 438 U.S. 586 (1978), and the Ohio death penalty statute, this was relevant mitigating evidence. O.R.C. § 2929.04. Further, it is unconstitutional for the sentencer to fail to give weight to such evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982). It is clear from the trial court's opinion, however, that he did give weight to such evidence, but found that as a whole the aggravating circumstances outweighed the mitigating circumstances, thus, warranting a death sentence.

In the trial judge's opinion, he separately addressed each of the statutory mitigating circumstances available to a capital defendant, and ruled as follows:

1. WHETHER THE VICTIM OF THE OFFENSE INDUCED OR FACILITATED IT.

   There was no evidence indicating this.

2. WHETHER IT WAS UNLIKELY THAT THE OFFENSE WOULD HAVE BEEN COMMITTED BUT FOR THE FACT THAT THE OFFENDER WAS UNDER DURESS, COERCION, OR STRONG PROVOCATION.

   There was no evidence offered as to this mitigating factor.

3. WHETHER AT THE TIME OF THE COMMITTING OF THE OFFENSE THE OFFENDER, BECAUSE OF MENTAL DISEASE OR DEFECT, LACKED SUBSTANTIAL CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW.

   The only evidence was the psychiatric reports presented and given to the Jury and there was no indication that there was any mental disease of any kind, nor that the defendant lacked any substantial capacity to appreciate is [sic] conduct.

   In fact, there was every indication that this was a deliberate planned act and there was no mitigating factors to be considered.

4. THE YOUTH OF THE OFFENDER.

At the time of this offense the offender was 19 years of age, having some lack of mental capacity, but the evidence was that the defendant planned and put into execution a scheme to free his brother from jail and to kill, if necessary, an officer.

5. THE OFFENDER'S LACK OF SUFFICIENT HISTORY OF PRIOR CRIMINAL CONVICTIONS AND DELINQUENCY ADJUDICATIONS.

As an adult the defendant had a criminal background of misdemeanor convictions and prior to that delinquency convictions. The Court is of the opinion that it is not a substantial history of prior criminal activity but certainly sufficient to show the vicious tendency of the defendant, John Glenn.

6. IF THE OFFENDER WAS A PARTICIPANT IN THE OFFENSE BUT NOT THE PRINCIPAL OFFENDER, THE DEGREE OF THE OFFENDER'S PARTICIPATION IN THE OFFENSE AND THE DEGREE OF THE OFFENDER'S PARTICIPATION IN THE ACTION THAT LED TO THE DEATH OF THE VICTIM.

Obviously, John Glenn is the principal offender and this does not apply.

7. ANY OTHER FACTORS THAT ARE RELEVANT TO THE ISSUES OF WHETHER THE OFFENDER SHOULD BE SENTENCED TO DEATH.

None.

Trial Court Opinion at 3-5.

Petitioner argues that the fact the trial judge indicated in his response to the seventh statutory mitigating circumstance that there were no other relevant mitigating circumstances that he failed to give weight to the ones that petitioner had offered. The plain language of the Opinion would suggest otherwise. Judge Martin specifically addressed and weighed each of the mitigating circumstances raised by the petitioner. It is evidence that his response to the seventh statutory category was intended to convey the message that the petitioner had not raised any other mitigating circumstances that were not previously noted in the Opinion.

Further, the fact that the trial court gave some weight to each of the mitigating circumstances is evident from the conclusion of the Opinion where Judge Martin states:

> The Court can come but to one conclusion, that the aggravating circumstance outweighs any mitigating circumstances beyond a reasonable doubt or in the opinion of this Court beyond any doubt that it is perfectly proper in this case that the death penalty be imposed.

Trial Court Opinion at 5. The fact that he did not assign to each mitigating circumstance the weight that petitioner believes should have been given, does not make the death sentence unconstitutional. Since the Court finds that the trial judge correctly weighed the aggravating circumstance and the mitigating circumstances in arriving at his sentence, petitioner's fourteenth ground for relief from sentence is denied.

I. Ground Twenty.

Through his twentieth claim for relief, petitioner challenges the effectiveness of his counsel on direct appeal.[36] Petitioner claims that his counsel failed to raise several key issues.

It is petitioner's contention that appellate counsel should have but failed to raise the following issues: the jurors' diminished sense of responsibility for the death verdict[37] ; the court reporter reading Simmons' testimony back to the jury[38] ; the juror who would vote for death "automatically[39] ;" the jurors' use of a dictionary[40] ; the inclusion of unproven criminal charges in the pre-sentence report[41] ; the allegedly

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[36]Petitioner was represented by John Breckenridge and Winther McCroom on direct appeal; the attorneys that represented petitioner at trial.

[37]Second Ground for relief.

[38]Nineteenth Ground for Relief.

[39]Eighth Ground for Relief.

[40]Twelfth Ground for Relief.

[41]Seventh Ground for Relief.

erroneous jury instruction in the penalty phase[42] ; the penalty phase instruction on mitigating factors not raised during the penalty phase of the trial[43] ; the failure to instruct on the possibility of exercising mercy[44] ; and the trial court's alleged failure to give any weight to the mitigating evidence[45].

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court ruled that a defendant charged with a capital crime was entitled to counsel at trial, at the states expense if necessary, and that a failure to provide counsel would result in the deprivation of the defendant's due process rights. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court extended that right to all defendants called upon to answer felony charges. The right was further expanded by the Court in *Douglas v. California*, 372 U.S. 353 (1962), to include the assistance of counsel for direct appeal.

During the period that the court was struggling to establish the limits of the defendant's right to appointed counsel, the court was also struggling with the question of what kind of representa-tion [sic] the defendant was entitled to receive. In 1942, the Court, in *Glasser v. United States*, 315 U.S. 60 (1942), recognized that the right to counsel at

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[42]Tenth Ground for Relief.

[43]Eleventh Ground for Relief.

[44]Ninth Ground for Relief.

[45]Fourteenth Ground for Relief.

trial would, indeed, be a hallow [sic] right if it did not include the right to effective assistance of counsel. The *Glasser* Court concluded that the right to assistance of counsel at trial meant the right to effective assistance of counsel at trial. The Court extended this right of effective assistance of counsel to the direct appeal in the decision of *Evitts v. Lucey*, 469 U.S. 387 (1984).

Under the landmark case of *Strickland v. Washington*, 446 U.S. 668 (1984), a defendant must "establish that his counsel's performance was seriously deficient and that he suffered prejudice as a result of such deficiency" in order to support a claim of ineffective assistance of counsel. *Eutzy v. Dugger*, 746 F. Supp. 1492, 1497 (N.D. Fla. 1989). Thus, in order to prevail on this claim, petitioner must prove that his appellant counsel's performance was grossly inadequate and that this inadequacy prejudiced petitioner.[46] Appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal. *Smith v. Murray*, 477 U.S. 527 (1987); and *Jones v. Barnes*, 463 U.S. 429 (1988). Further, it is counsel's obligation to his client to wade through the possible appellate issues and present those which appear to hold most promise for his client's case. As an officer of the court, counsel also has an obligation not to "clog the courts with frivolous motions or appeal." *McCoy v. Court of Appeals*, 486 U.S. 429, 438 (1988).

Each issue that petitioner claims his counsel erroneously failed to raise on direct appeal was a separate ground for relief in the present petition, was considered by this Court, and found to lack merit, or amount to nothing more than harmless error. Due to the questionable nature of the claims, appellate counsel had no obligation to raise the above-

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[46]A more thorough analysis of the *Strickland* standard can be found in the discussion of Ground 1, *supra*.

mentioned claims on appeal, and was not ineffective for failing to do so. Further, since the claims lack merit, petitioner cannot establish that he was prejudiced by his appellate counsel's failure to raise the claims. Since petitioner cannot satisfy either prong of the *Strickland* test, petitioner's twentieth ground for relief must fail.

J. Ground Twenty One.

Petitioner also challenges the quality of the review performed by the Ohio Supreme Court. Petitioner claims that the Ohio Supreme Court failed to conduct an independent weighing of the aggravating circumstance and the mitigating circumstances to determine if his death sentence was properly imposed.

Under O.R.C. § 2929.05(A):

> Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.

This statute is consistent with the United States Supreme

Court's emphasis on the importance of meaningful appellate review of death penalty sentencing. *See Gregg v. Georgia*, 428 U.S. 153 (1976); and *Proffit v. Florida*, 428 U.S. 242 (1976).

As the statute suggests, under O.R.C. § 2929.05(A), before an appellate court may affirm a death sentence, the court must conduct an independent review of the record, weigh the existing aggravating and mitigating circumstances and "articulate the reasons why the aggravating circumstances outweigh the mitigating factors." *State v. Maurer*, 15 Ohio St. 3d 239 (1984). Failure to do so renders the statutorily required review meaningless.

Petitioner argues that the Ohio Supreme Court did not conduct an independent review, but merely adopted the Ohio Court of Appeals' Opinion[47], resulting in a "rubber stamp" of the lower court's decision. In support of this position, petitioner compares the language found in the Court of Appeals' decision with that found in the Ohio Supreme Court's Opinion. Petitioner placed two pages from the Ohio Supreme Court's Opinion next to the Opinion from the Portage County Court of Appeals to demonstrate that the identical language was used in both opinions. This, petitioner argues, demonstrates that the Ohio Supreme Court did not conduct its own independent review, but merely relied on the review conducted by the court of appeals.

The Court finds that the Ohio Supreme Court complied with the mandates set forth in O.R.C. § 2929.05(A). The lengthy opinion set out by the Supreme Court contains a detailed review of the record, including the facts surrounding the crime, and the issues raised in the lower courts. Thus,

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[47]*State v. Glenn*, No. 1286 (Portage County, February 22, 1985).

the court set forth the facts upon which it would base its decision. The fact that the Supreme Court chose to rely on, and in essence adopt, the analysis and conclusion of the lower court does not invalidate the independent review it obviously conducted. Finding that the Ohio Supreme Court conducted an independent review of petitioner's case in compliance with O.R.C. § 2929.05(A), petitioner's twenty-first claim for relief is denied.

K. Ground Twenty Two.

In his twenty second ground for relief, petitioner challenges the constitutionality of Ohio's statutory scheme, as well as several facets of the death penalty itself. In *Gregg v. Georgia*, 428 U.S. 153 (1975), the Court held that the death penalty was not *per se* unconstitutional. The *Gregg* Court held that the sentence of death did not violate the Eighth and Fourteenth Amendments to the Constitution so long as it was not imposed in an arbitrary or capricious fashion. *Id.*

Ohio's death penalty statutory scheme was held to be constitutional in *State v. Glenn*, 28 Ohio St. 3d 451 (1988). Petitioner claims, however, that Ohio's death penalty is unconstitutional because proportionately more blacks than whites receive death following an aggravated murder conviction. In support of this argument petitioner presents statistical evidence which suggests that while blacks account for 10.6% of the general population in Ohio, they represent 56% of the inmates on death row.[48] Courts have warned that the imposition of the death penalty must be examined on a

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[48]Petitioner also notes that even though there are generally more minority murder victims than white murder victims; sixty-eight percent of the cases on Ohio's death row involve white victims.

case by case basis, and that general claims of disproportionality, even if accompanied by statistical evidence, are insufficient to render a death sentence invalid. *McKleskey v. Kemp*, *supra*, at 303.

Evidence of disproportional representation does not establish constitutional violation so long as the sentencer in the particular case under review was granted specific and detailed guidance, and was provided with evidence of the "particularized nature of the crime, and the particularized characteristics of the individual defendant." *McKleskey v. Kemp*, 481 U.S. 299, 303 (1986). Thus, the mere fact that there exists a disparity as to the percentages of blacks vs. whites who receive death sentences in Ohio, without more, is insufficient to establish a constitutional violation.

Petitioner also urges this Court to conclude that the death penalty is a disproportionate response to the crime of murder. However, the Court in *Gregg, supra* specifically held:

> There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. *Gregg, supra* at 187 (citations omitted).

Petitioner also challenges Ohio's method of execution, namely electrocution. Petitioner argues that electrocution is cruel and unusual in violation of the Eighth Amendment. Petitioner further argues that execution is not the least

restrictive means for accomplishing societal goals.

The courts cannot "require the legislature to select the least severe penalty possible so long as the penalty selected is not purely inhumane or disproportionate to the crime involved." *McKleskey*. The Court has not passed on the constitutionality of electrocution as a means of execution since it was condoned in *In re Kemmel*, 136 U.S. 436 (1890). The *Gregg* Court did, however, cite the *In re Kemmel* Court favorably, noting the death penalty does not do violence to society's ethics and values. Further, every circuit that has ruled on the constitutionality of electrocution since *In re Kemmel* has upheld the practice. *See Jones v. Whitley*, 938 F.2d 536 (5th Cir. 1991); and *Swindler v. Lockhart*, 885 F.2d 1342 (8th Cir. 1989). The Court rules that electrocution under Ohio's death penalty statutes is a constitutional means of dispensing the sentence of death.

In a related argument, petitioner alleges that the sentence of death fails to meet the goals of punishment. Specifically, petitioner asserts that capital punishment fails to deter or rehabilitate the offender, two goals identified in *Gregg, supra*. In *Gregg, supra*, however, the Court also raised retribution as a legitimate goal, and noted that death obviously satisfies this goal. Further, the *Gregg* Court acknowledged substantial evidence which suggests that the death penalty does serve as an effective deterrent to other would be offenders.

Petitioner also raises what he claims are provisional deficiencies inherent in Ohio's statutory scheme. First, petitioner claims that the prosecutor is granted unfettered discretion to determine who will be eligible for a death sentence and who will be spared. This, however, is not the case. The prosecutor is guided by the existence or lack thereof of aggravating circumstances enumerated in the

statute. O.R.C. § 2929.04. *See Proffit, supra*; and *Gregg, supra*. Further, a limited amount of discretion vested in the prosecutor works an advantage to those accused of murder as it allows the prosecutor to consider at each step of the adversarial process whether to remove the defendant from consideration for the death penalty, and leaves open the possibility for mercy. *McKlesky, supra*; and *Gregg, supra*.

Second, petitioner claims that the statute impermissibly shifts the burden to the defendant to prove the existence of mitigating circumstances by a preponderance of the evidence. O.R.C. § 2929.04(B). *See also State v. Jenkins*, 15 Ohio St.3d 164 (1984). Petitioner contends that it should be the prosecution's burden to prove the absence of any mitigating circumstances. This claim is without merit. In upholding statutes with similar requirements placed on the defendant, courts have noted that the burden of establishing the existence of aggravating factors and that these aggravating factors outweigh the mitigating factors remains with the prosecution. *See Walton v. Arizona*, 497 U.S. 639) [*sic*] (plurality opinion); and *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990).

Third, petitioner argues that Ohio's statutory structure, under certain circumstances, results in an automatic death sentence in violation of *Furman v. Georgia*, 408 U.S. 238 (1972). Petitioner claims that under the Ohio statute, if the jury finds at least one aggravating circumstance and no mitigating circumstances it must impose a sentence of death. To characterize this as a mandatory death sentence, however, is to ignore the procedure that the sentencer must follow before he can vote for death. The jury must first look for the existence of aggravating circumstances, and if they find that any do exist they must then determine whether there are any mitigating circumstances. It is only when they find that there are no mitigating circumstances, or that the aggravating

circumstances outweigh any existing mitigating circumstances that they arrive at death as an appropriate sentence. Such an involved procedure hardly results in an automatic death sentence.

Fourth, petitioner challenges the provision of the statute which requires that the judge make available to the jury the pre-sentence report and the report of the mental evaluation if such documents as requested by the defendant. O.R.C. § 2929.03(D)(1). Petitioner claims that a capital defendant has a right to control the evidence it puts before the jury, and should have a right to exclude all or portions of these documents if the contents are harmful to his case. This argument lacks merit. The sentencer has the right to have before him all relevant information regarding the crime and the individual who committed it. *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989). Further, under the statute it is the defendant's decision to request the pre-sentence report and the mental evaluation. If the defendant believes that negative evidence will be contained in either of the reports, he may choose not to request them.

In his final attack on the Ohio death penalty law, petitioner claims that the state statutes tend to deny a defendant of [sic] his or her Sixth Amendment right to a jury trial. Petitioner argues that if a defendant chooses to have his case heard by a jury, his jury will be bound to impose a death sentence if it collectively finds that the aggravating circumstances outweigh the mitigating circumstances. If the defendant chooses rather to plead guilty or no contest to an indictment which contains capital specifications, the judge may, "in the interest of justice," dismiss the specifications. Ohio Crim. P. Pro. 11(C)(3).

A law which penalizes a defendant for choosing to exercise his right to a jury trial is unconstitutional, in

violation of the Sixth Amendment. *United States v. Jackson*, 390 U.S. 570 (1967). Ohio's statutory scheme, however, does not run afoul of the Sixth Amendment. Even if the defendant chooses a jury trial and the jury returns a conviction and a death verdict, the judge still has the right to override the jury's sentence and sentence the defendant to one of two possible life sentences.[49] O.R.C. § 2929.03(D)(3). Thus, a defendant may have his sentence set aside regardless of his decision to test the government's case, and is in no way prejudiced by his decision to pursue his constitutional right to a jury trial. Finding no constitutional flaw in Ohio's death penalty law, the Court holds that petitioner's twenty second claim is denied.

IX. CONCLUSION

Based on the Court's rulings denying each of the twenty seven grounds for relief advanced by the petitioner, the Court denies the petitioner relief in habeas corpus and will publish a judgment entry to that effect.

The Court previously granted the petitioner's motion to stay the execution of the death sentence. In view of the strong likelihood that the petitioner will challenge promptly the Court's judgment, the Court will continue the stay until further order.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

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[49]The sentences that are available are: life imprisonment with parole available only after twenty full years of prison, or life imprisonment with parole available only after thirty full years of prison.

Case No. 93-3568 Filed: 2/26/96

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN GLENN,	:	
	:	
Petitioner-Appellant,	:	
	:	
v.	:	ORDER
	:	
ARTHUR TATE, JR., WARDEN,	:	
	:	
Respondent-Appellee.	:	

BEFORE: GUY, NELSON, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Filed: 10/7/91

John GLENN, petitioner,
v.
OHIO.
No. 90-8091
Supreme Court of the United States
October 7, 1991

Case below, 28 Ohio St.3d 451, 504 N.E.2d 701; 33 Ohio St.3d 601, 514 N.E.2d 869; 57 Ohio St.3d 723; 568 N.E.2d 1226.

Petition for writ of certiorari to the Court of Appeals of Ohio, Portage County.

Denied.

Filed: 2/20/91

THE SUPREME COURT OF OHIO

1991 TERM

To wit: February 20, 1991

State of Ohio, : Appellee,:Case No. 90-2231
:
v. : E N T R Y
John Glenn, :
Appellant. :

Upon consideration of the motion for an order directing the Court of Appeals for Portage County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. 89P2090)

THOMAS J. MOYER
Chief Justice

Filed: 12/11/90

STATE OF OHIO) IN THE COURT OF APPEALS
) ELEVENTH DISTRICT
COUNTY OF PORTAGE)

STATE OF OHIO,
Relator-Appellee,
vs.
JOHN GLENN,
Petitioner-Appellant.

JUDGMENT ENTRY
CASE NO. 89-P-2090

For the reasons stated in the Opinion Upon Reconsideration, Petitioner, having failed to call to our attention anything which was not previously considered by this court, cannot maintain the present motion.

Motion for reconsideration overruled.

JUDGE DONALD R. FORD
FOR THE COURT

COX, J., Seventh Appellate District,
sitting by assignment.
BASINGER, J., Putnam County Court
Common Pleas, sitting by assignment.

COURT OF APPEALS
ELEVENTH DISTRICT
PORTAGE COUNTY, OHIO

JUDGES

STATE OF OHIO,	HON. DONALD R. FORD, P.J.,
	HON. EDWARD A. COX, J.,
Relator-Appellee,	Seventh Appellate District
	Sitting by assignment,
JOHN GLENN,	HON. RANDALL L. BASINGER,
	Putnam County Common Pleas Court,
Petitioner-Appellant.	Sitting by assignment.
	CASE NO. 89-P-2090

OPINION UPON RECONSIDERATION

JUDGMENT: Motion for Reconsideration overruled.

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Ohio Public Defender Commission
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Counsel for petitioner-appellant, John Glenn, has applied for reconsideration of our judgment entered on September 19, 1990. *State v. Glenn* (Sept. 21, 1990), Portage App.

No. 89-P-2090, unreported. Counsel challenges this court's conclusion, contained in the sixth assignment, that the doctrine of *res judicata* precluded review of the competency of the mitigation evaluations. Counsel claims that petitioner's sixth assignment is based upon evidence *dehors* the record and could not, by definition, have been raised on direct appeal.

In determining whether this court shall reconsider a decision pursuant to App.R.26, the following general questions must be asked: "[W]hether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. Based upon this standard of review, we turn to the instant case.

Before addressing the applicability of the doctrine of *res judicata* in the present case, this court must take exception to an erroneous assertion contained in the memorandum in support of petitioner's application for reconsideration. There counsel states that "this court found that the [mental] evaluations were deficient ***." On the contrary, this court concluded that it was "precluded from rendering [such] a determination *** as petitioner failed to raise the issue on direct appeal." *Glenn, supra*, at 31.

As a general rule, the Ohio Supreme Court has found *res judicata* a proper basis upon which a court of appeals may dismiss a petition for post-conviction relief. In *State v. Perry* (1967), 10 Ohio St.2d 175, 180, the Court found:

> "*** Under the doctrine of *res judicata*, a final judgment of conviction *bars the convicted defendant from raising* and litigating any proceeding, except an

appeal from that judgment, *any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.*" (Emphasis added).

In the case *sub judice*, counsel for petitioner alleges in the sixth assignment of error that psychological/medical evaluations which went to the jury were "not conducted in a competent or appropriate manner." However, the issue of the "competence or appropriateness" of these medical evaluations is *res judicata*. Trial counsel had the opportunity to review the mental evaluations of Drs. Siddall and Ramani prior to the mitigation hearing, and specifically objected to their conclusions as to the existence or non-existence of mitigating factors. Trial counsel stated that the doctors' summaries and recommendations were inappropriate and uncalled for and should be stricken. Clearly, these objections preserved trial counsel's ability to raise the issue contained in the sixth assignment of error at the mitigation hearing or on direct appeal, which he failed to do.

Moreover, due to the fact that a competency evaluation was conducted on petitioner, sufficient medical information regarding petitioner's psychological and mental condition was available to trial counsel which was sufficient to give him an opportunity to raise issues regarding the adequacy of Dr. Siddall's and Dr. Ramani's reports on direct appeal. Trial counsel was aware of petitioner's low IQ, head bumping, and previous mental counseling. Although this information was not identical to that proffered by counsel representing petitioner in his post-conviction appeal, it was of sufficient character to provide a predicate for challenging the adequacy of the psychological examinations. Accordingly, the failure to do so constitutes *res judicata*.

However, the application of *res judicata* in the sixth assignment of error did not thwart petitioner's ability to separately argue these alleged deficiencies under the general penumbra of ineffective assistance of counsel. In fact, the subject matter of the sixth assignment was adequately addressed by this court in petitioner's ninth assignment of error of the post-conviction appeal. In the ninth assignment, this court concluded that trial counsel's failure to present medical information *identical* to the information tendered by counsel in the post-conviction relief proceeding *did not* constitute ineffective assistance of counsel.

From the foregoing analysis, it is evident that trial counsel was not impeded from attacking the psychological reports of Drs. Siddall and Ramani on direct appeal. Trial counsel was aware of sufficient information to challenge these evaluations. He did enter timely objections to these reports. As such, questions regarding the "competence and appropriateness" of these evaluations could fairly have been determined without resort to evidence *dehors* the record. We therefore conclude that the application of the doctrine of *res judicata* was appropriate regarding petitioner's sixth assignment of error. See, generally, *State v. Cole* (1982), 2 Ohio St.3d 112, 13-114; *State v. Jenkins* (1987), 42 Ohio App.3d 97, 99.

Petitioner, having failed to call to our attention anything which was not previously considered by this court, cannot maintain the present motion. Accordingly, motion for reconsideration overruled.

JUDGE DONALD R. FORD

COX, J., Seventh Appellate
District, sitting by assignment,

BASINGER, J., Putman County Common Pleas Court, sitting by assignment,

concur.

Filed: 9/24/90

STATE OF OHIO) IN THE COURT OF APPEALS
) ELEVENTH DISTRICT
COUNTY OF PORTAGE)

STATE OF OHIO,
Respondent-Appellee,
vs. JUDGMENT ENTRY
JOHN GLENN, CASE NO. 89-P-2090
Petitioner-Appellant.

For the reasons stated in the opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

JUDGE DONALD R. FORD
FOR THE COURT

COX, J., Seventh Appellate District,
sitting by assignment.

BASINGER, J., Putnam County Court
Common Pleas, sitting by assignment.

COURT OF APPEALS
ELEVENTH DISTRICT
PORTAGE COUNTY, OHIO

JUDGES

STATE OF OHIO,	HON. DONALD R. FORD, P.J.,
	HON. EDWARD A. COX, J.,
Respondent-Appellee,	Seventh Appellate District
	Sitting by assignment,
JOHN GLENN,	HON. RANDALL L. BASINGER,
	Putnam County Court of Common Pleas
Petitioner-Appellant.	Sitting by assignment.
	CASE NO. 89-P-2090

OPINION

CHARACTER OF PROCEEDINGS:	Post-Conviction Appeal from Portage County Court of Common Pleas Case No. 82CR0072

JUDGMENT: Affirmed.

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(For Petitioner-Appellant)

FORD, J.

Petitioner-appellant, John Glenn, was indicted on November 6, 1981 for aggravated murder, with the capital specification in R.C. 2929.04(A)(6), in connection with the fatal shooting of a peace officer, reserve sheriff's deputy Sonny Litch, during an attempt to facilitate the escape from custody of petitioner's half brother, Robert Glenn.

Following a change of venue, due to the extensive publicity generated by the case, petitioner was tried before a jury in the Portage County Court of Common Pleas and was convicted of aggravated murder, with the capital killing of a police officer specification, on August 20, 1982. After the completion of the statutorily mandated mitigation hearing (R.C. 2929.03[D]) on September 3, 1982, the jury recommended that petitioner be sentenced to death. The trial judge adopted the jury's recommendation the following day.

Petitioner's sentence was affirmed on direct appeal, both by this court (*State v. Glenn* [Feb. 19, 1985], Portage App. No. 1286, unreported) and by the Ohio Supreme Court (*State v. Glenn* [1986], 23 Ohio St.3d 451). The United States Supreme Court denied petitioner's writ of certiorari on June 15, 1987.

Petitioner was granted a six month stay of execution, on October 7, 1987, for the purpose of preparing and filing a petition for post-conviction relief pursuant to R.C. 2953.21, et seq. An evidentiary hearing was held on petitioner's claims in the trial court May 2 through May 4, 1989.

The vast majority of petitioner's submissions at the post-conviction hearing related to alleged ineffective assistance of counsel provided by petitioner's original attorneys, particularly during the mitigation phase of petitioner's trial.

Therefore, it would be instructive to review the events of the original mitigation hearing.

R.C. 2929.04(B) states:

"***[T]he court, trial jury or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3)- Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

After the conclusion of the sentencing phase of petitioner's trial, his counsel requested that a pre-sentence investigation be undertaken and that he be given a mental examination, pursuant to R.C. 2929.03(D). However, when counsel read the completed pre-sentence investigation report, it was discovered that the report included unsworn statements by various witnesses which related to other crimes allegedly committed by petitioner. The report also contained, as petitioner's post-conviction relief counsel noted, evidence of unadjudicated offenses. Trial counsel objected to the presentation of this pre-sentence investigation report to the jury, due to the inclusion of these hearsay statements, but the trial court overruled the objection.

Trial counsel also objected to the presentation of the mental health examination report to the jury. Counsel's objections centered around the inclusion, in the psychiatric evaluations prepared by Drs. Siddall and Ramani, of comments on the mitigation factors. Ramani went so far in his report as to conclude that "[i]n summary, within reasonable medical certainty, I do not see any imtigating [*sic*] circumstances in this particualr [*sic*] individual." The reports of Ramani and Siddall were also presented to the jury over counsel's objection.

Petitioner presented several witnesses in his behalf during the mitigation hearing. These witnesses included: Rev. Howard Wells, a pastor in St. James' Church, who used to drive petitioner to church on Sundays when petitioner was between the ages of 8-12; Martha Lindsay, a visiting teacher who attempted to help petitioner with his academic performance as a fourth and fifth grader; Rev. William Moseley, whose testimony was adduced for the purposes of

demonstrating a biblical abhorrence of the death penalty (the trial court would not allow counsel to present this testimony); Robert Jones, an attorney, testifying that, in his opinion, petitioner did not have a substantial criminal record (aside from the present conviction); and petitioner himself, by means of an unsworn statement.

Petitioner also presented a videotape made by counsel and a local television personality, which contained interviews with petitioner's mother and former employer, along with a great deal of editorializing by the television personality/narrator. The trial court refused to admit this tape into evidence on the grounds that it consisted entirely of unsworn statements and that the witnesses were not available for cross-examination. Neither petitioner's mother nor the former employer ever testified at the mitigation hearing.

Petitioner's claims, raised at his hearing for post-conviction relief, essentially fell into two categories: those that addressed errors purportedly made by trial counsel during the trial, and those relating to trial counsel's failure to effectively present mitigation evidence during that stage of the proceedings. The overriding theme of petitioner's contentions is that trial counsel failed to obtain psychological, school, or mental health records which would have demonstrated considerable organic brain impairment on the part of the petitioner.

To this end, petitioner presented the testimony of a number of members of his family. These family members testified as to the poverty in which petitioner was raised, the lack of a father figure, and the apparently persistent physical abuse that petitioner suffered as a child. Each family member testified that he/she would have testified at petitioner's trial if asked; but, on cross-examination, the state noted the presence of affidavits signed by each family

member which contained negative information about the petitioner.

Petitioner also presented the testimony of three psychologists, each of whom had interviewed the petitioner, and had access to his previous school, psychological, and medical records, as well as petitioner's social history. (This information was not provided to Drs. Siddall and Ramani by trial counsel, and was substantially not made available to them from other sources). It was the conclusion of these post-conviction psychologists, based on review of record, individual physical and mental testing of the petitioner, and a review of petitioner's social history, that petitioner was mentally handicapped. Dr. Leland testified that petitioner's mother had undergone surgery during her first trimester and was given general anesthesia. This anesthesia, coupled with subsequent pain medication, in his view, probably caused brain damage *in utero* to the petitioner. Dr. Tanley's testimony was even more emphatic than Leland's on this point. He noted that the results of his testing indicated that petitioner suffered from global brain damage. This condition, coupled with low intelligence, would limit petitioner's "efficiency of dealing with life, of being able to handle the complexity, of being able to benefit from experience, of being able to process quickly and accurately, all of those things are showing impairment and would seem to make life difficult in many, many ways."

Tanley further noted that evidence of petitioner's impairment could be traced in his physical behavior while growing up; *vis.*, hyperactivity, rocking activity, banging his head against the wall, and bed-wetting. Tanley also commented on some fairly graphic abuse suffered by petitioner as a small boy (being hit in the head by a brick thrown by his mother, for example). Tanley concluded that petitioner lacked substantial capacity to conform his conduct

to the requirements of law at the time of the crime, pursuant to R.C. 2929.04(B)(3). Leland and Tanley's findings were further corroborated by Dr. Eisenberg.

When asked to reconcile their findings with those presented by Drs. Ramani and Siddall at the mitigation hearing, the doctors at the post-conviction hearing commented that their findings were based on access to considerable information not given to Drs. Ramani and Siddall. The only information to which Drs. Siddall and Ramani had access was that provided by the state. Drs. Ramani and Siddall did not have access to previous medical or school records, but were provided with imput [*sic*] as to petitioner's social history. Further, Drs. Ramani and Siddall had been informed by the state that petitioner had already been sentenced to death at the time of the preparation of the psychological examination.

Petitioner attempted to introduce the actual files of Siddall and Ramani to corroborate their lack of information, but the trial court excluded this evidence.

Following the introduction of the medical evidence, petitioner adduced testimony from expert witnesses who testified to a purported standard of attorney practice in capital cases. These witnesses included two specialists who stated that they would have been available for consultation during petitioner's original trial; witnesses who related what, in their view, an attorney's duties were in terms of the requirement to investigate; and, witnesses who commented on errors purportedly made by counsel during trial and the direct appeal.

In response to petitioner's evidence, the state produced several witnesses. These witnesses included: Vincent Gilmartin, the original prosecutor in the case, who stated

that, in his view, and based upon his observations of counsel's work effort, petitioner was provided with adequate representation. Two experts, Samuel Amendolara and Thomas Zena, also testified that in their respective opinions, petitioner's trial counsel was adequate.

On June 21, 1989, the Portage County Court of Common Pleas denied petitioner's request for post-conviction relief. Petitioner has now timely appealed to this court, and raises the following assignments of error:

"1. It is error in a capital case for the prosecutor and trial court repeatedly to inform the jurors that a death verdict is only a recommendation. Such comments are violative of the Eighth and Fourteenth Amendments to the United States Constitution.

"2. The trial court erred by allowing a state's witness who had never done a capital appeal to testify that, in his opinion, John Glenn's counsel rendered effective assistance on appeal.

"3. The trial court erred in concluding that John Glenn received effective assistance of counsel on appeal.

"4. The trial court erred by denying admission of defendant's Exhibit O, the Summit County Psychodiagnostic Clinic's file on John Glenn's mitigation evaluations.

"5. The trial court erred in rejecting the expert psychological evidence put on by John Glenn at his evidentiary hearing.

"6. The trial court erred in concluding that Mr. Glenn received a fair sentencing trial. The court clinic

mitigation evaluations which went to the jurors at his capital trial were not conducted in a competent or appropriate manner.

"7. The trial court erred by allowing the prosecuting attorney at John Glenn's capital case to testify that, in his opinion, Mr. Glenn's defense counsel were prepared and gave an adequate performance at the mitigation phase of trial.

"8. The trial court erred by admitting the opinion testimony of the state's expert witness on ineffective assistance of trial counsel when that opinion was based on assumptions and personal beliefs.

"9. The trial court erred in concluding that John Glenn received effective assistance of counsel at the mitigation phase of his capital trial.

"10. The trial court's conduct and remarks at the evidentiary hearing denied John Glenn full, fair and reliable consideration of his claims for relief."

In petitioner's first assignment of error, he contends that it was error for the trial court and the prosecutor to repeatedly inform jurors that a death verdict was only a recommendation. Petitioner grounds his contention on the United States Supreme Court case of *Caldwell v. Mississippi* (1985), 472 U.S. 320, which stated that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been lead to believe that the responsibility for determining the appropriateness of the death penalty rests elsewhere." *Id.* At 328-329. The philosophical underpinnings of the *Caldwell* doctrine were set forth by Justice Harlan, in *McGautha v. California* (1971), 402 U.S. 182, 208, where he wrote that the sentencing

scheme's premise was that "*** jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with due regard for the consequences of their decision ***." *Id.* quoted in *Caldwell* at 329, 330.

Petitioner argues that statements made by the prosecutor and the trial court helped to alleviate this onus of responsibility which would otherwise be carried by the jurors. An example of the statements in controversy is illustrated by the following colloquy, between the state and a prospective juror, Mr. Hartman:

> "Q. And at that time the jury would deliberate upon the possibility of the question of punishment and one available recommendation would be the imposition of the death penalty but that would only be a recommendation, do you understand that?
>
> "A. I hadn't but --
>
> "Q. Well, I would like you to understand that because it might make a little easier for you how you should proceed. It is a recommendation that is made to the Court which the Court can recommend, can accept or reject. Do you understand that?
>
> "A. Yes.
>
> "Q. Sure. I just didn't want you to think that it's automatic once you reach a certain point, that it's self executing or something to that effect."

Petitioner contends that this dialogue, which is purportedly representative of that undergone by nine members of the jury who sat in this case, served as a talismanic reassurance that the jurors could vote for the death

penalty without needing to worry about any potential recourse to his or her conscience that would result in sending a fellow human being to his death. Such comments, petitioner alleges, are clearly in violation of the dictates of *Caldwell*.

The state responds that petitioner's trial counsel failed to raise the *Caldwell* issue on appeal. At this juncture, though, it should be noted that *Caldwell* had not been argued before the Supreme Court until February 25, 1985, and had not been released until July 11, 1985. The original appeal on this case was released on February 15, 1985. Thus, petitioner's alleged deficiencies with trial counsel for failure to raise the "*Caldwell* issue" are misguided.

Moreover, even assuming the existence of *Caldwell* at the time of the underlying action, this court would still find petitioner's argument to be without merit. As the state correctly contends, petitioner's explication of the status of *Caldwell* objections is incomplete. In the recent United States Supreme Court case of *Dugger v. Adams* (1989), 489 U.S. 401, the court noted that "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger, supra*, at __.

Similarly, this state, in *State v. Rogers* (1986), 28 Ohio St.3d 427, stated that "*Caldwell v. Mississippi* *** is inapplicable where the statements made to the jury during the mitigation phase of a capital trial were accurate statements of the law and wee not made to induce reliance on the appellate process." *Id.* at the first paragraph of the syllabus.

In *Rogers, supra*, the court reiterated its dislike for such comments.

> "We have repeatedly stated that 'because of the possible risk of diminishing jury responsibility,' '*** we prefer that in the future no reference be made to the jury regarding the finality of their decision ***.' *State v. Williams* [(1986), 23 Ohio St.3d 16], at 22, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 202-203, certiorari denied (1985), 473 U.S. ___, 87 L.Ed.2d 643. In so stating, we reserved power to evaluate such references in the context of the record to determine the impact of such statements and whether defense counsel, by its statements, created a reasonable basis for a response from the prosecution." *Id.* at 433.

Thus, upon review of such alleged improprieties, the appellate court must examine the totality of the circumstances to determine the impact of the statements.

Additionally, the *Rogers* court, while endorsing the underlying legal tenet espoused in *Caldwell*, failed to find the existence of a similar violation because "Ohio's statutory framework for the imposition of the death penalty is altogether different from that of Mississippi, most importantly in that Ohio has no 'sentencing jury.'" *Id.* at 429.

Finally, examination of the Ohio death penalty statutes, R.C. 2929.01 *et seq.*, indicates that comments made by the state did not misstate the role conferred by the jury by Ohio law. They were "mere accurate statements of the law," and not violative of petitioner's constitutional rights. *Id.* Therefore, this assignment is without merit.

Petitioner's second assignment of error asserts that the trial court erred by allowing the state to present, as an expert witness, the testimony of someone who had never conducted a capital appeal. Petitioner asserts that capital appellate

litigation is a highly specialized area of the law which demands more than simple exposure to (or practice in) the criminal appellate arena.

Petitioner's directs this court's attention to Evid. R. 702, which states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In the course of his testimony, the state's expert witness, Thomas Zena, stated that he was currently licensed by the Supreme Court of Ohio to try capital cases with death specifications. Further, he had tried four or five death penalty cases, two to completion. He also testified he was familiar with criminal appellate practice form his experience in handling criminal appeals.

There is no requirement in Evid. R. 702 mandating that the expert in question must have actual practice experience in the field upon which she or he is providing expertise. As the state correctly notes, an expert may be qualified by knowledge or education, as well as by skill or experience. Clearly, Mr. Zena's exposure and experience with death penalty cases has provided him with a sufficient background for him to qualify as a witness under Evid. R. 702. Furthermore, petitioner has not demonstrated how he was prejudiced or that the court's decision permitting Zena to testify as an expert was "unreasonable, arbitrary or unconscionable." Accord *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

Petitioner's second assignment is without merit.

Petitioner's third assignment of error is comprised of several subparts, all of which challenge the effectiveness of trial counsel during petitioner's direct appeal. (This is to be distinguished from petitioner's ninth assignment of error which discusses purported ineffective assistance of counsel during the mitigation hearing at the trial stage).

Prior to examining each individual subpart of petitioner's assignment, it is instructive to evaluate some overriding principles which govern the examination of ineffective assistance of counsel claims. As this court stated, in *State v. Peine* (Jul. 21, 1989), Lake App.No. 13-088, unreported:

> "In judicially scrutinizing counsel's performance, the court must be deferential and 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***.' *Strickland v. Washington* (1984), 466 U.S. 668, 689 ***.
>
> "'When considering an allegation of ineffective assistance of counsel a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of defense counsel's duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397." *Id.* at 14.

Moreover, to demonstrate ineffective assistance of counsel, petitioner is responsible for showing that "there is a reasonable probability that, *but for counsel's unprofessional*

errors, the result of the proceedings would have been different." Strickland, supra, at 694. (Emphasis added.)

This court is also aware, as it examines petitioner's third assignment, that the failure of counsel to raise alleged errors in the direct appeal of a trial (thus causing them to be considered *res judicata* during post-conviction relief, ala *State v. Perry* (1967), 10 Ohio St.2d 175), does not give rise to a meritorious claim of ineffective assistance of counsel when petitioner would not have prevailed upon consideration of the errors had they been actually raised. *State v. Benner* (1988), 40 Ohio St.3d 301, 315. With these precepts in mind, this court now examines the various subparts of petitioner's third assignment of error.

In the first subpart of petitioner's third assignment, he claims that the failure of trial counsel to interpose a *Caldwell* argument during direct appeal constituted ineffective assistance of counsel. This argument was tertially discussed in conjunction with petitioner's first assignment of error. As *Rogers, supra*, notes, there is no *Caldwell* error when the statements of law made by the state were accurate representations of the law and were not made to induce reliance on the appellate process. Examination of the record does not indicate that the state made any statements, in the case *sub judice*, that would have been found impermissible under *Rogers*. Therefore, as petitioner would have been unsuccessful, even assuming his counsel was clairvoyant, and the *Caldwell* issue had been raised on direct appeal, this court finds no prejudice has inured to the petitioner by failing to raise this issue.

The second subpart to petitioner's third assignment argues that trial counsel erred in failing to appeal the nonremoval of a juror for cause on grounds propagated by *Witherspoon v. Illinois* (1968), 391 U.S. 510. This issue

arose in the voir dire of juror Edwin Guenther, who stated:

> "Q. *** If you're called upon as a juror could you consider all the penalties or would your beliefs, if you have any, cause you automatically to vote against the imposition of the death penalty without regard to any evidence that might be developed at the trial?
>
> "A. I would vote for it if he's guilty.
>
> "Q. Now, that's -- are you saying if he's guilty you would automatically vote for the death penalty?
>
> "A. That's right."

Petitioner argues that, under *Witherspoon*, a juror who states that he cannot or will not follow the law may not be seated as a juror. Therefore, petitioner concludes, failure to raise this argument on appeal constituted ineffective assistance of counsel.

The United States Supreme Court has recently held, in *Wainwright v. Witt* (1985), 469 U.S. 412, quoting *Adams v. Texas* (1980), 448 U.S. 38, 45, that:

> "*** a juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath*. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Id.* at 420. (Emphasis in original.)

Examination of Guenther's colloquy with counsel during voir dire indicates that his views should not have substantially

impaired the performance of his duties.

> "Q. ***Well, do you follow me to distinguish on one hand between his being guilty as you say and the need for you as a member of this jury to consider other factors in whether or not you recommend or do not recommend the death penalty?
>
> "A. Well, I would try to get the other factors first.
>
> "Q. You wouldn't automatically, as you say, because he's proven guilty then go to the next step to vote for the death penalty?
>
> "A. The last resource. That would be my recourse [*sic*]."

This reading of the trial transcript indicates that, although Guenther's original answers may have run afoul of *Witherspoon*, his subsequent responses imply that his mental set on this issue was within the parameters of *Witt, supra*. Consequently, the trial court was correct in seating him and petitioner's trial counsel would not have been successful in arguing this issue on appeal. Therefore, under *Benner, supra*, this subpart lacks merit.

Petitioner's third subpart argues that trial counsel should have challenged certain jury instructions on appeal, and that failure to do so constituted ineffective assistance of counsel. The trial court, in the charge in question, stated that "[y]ou as jurors must not be influenced by any consideration of sympathy or prejudice." Petitioner directs this court's attention to *Parks v. Brown* (C.A. 10, 1988), 860 F.2d 1545, in support of this proposition.

In *Parks, supra*, the petitioner in question objected to a

prosecutorial statement, which stated:

> "But, you know, you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You have just become a part of the criminal justice system that says, when anyone does this, that he must suffer death. The law does all of these things, so it's not on your conscience.***" *Id.* at 1549.

The tenth district, when construing this prosecutorial comment, observed:

> "***it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, 'mercy,' 'humane treatment,' 'compassion' and full 'individualized' consideration of the 'humanity' of the defendant and his 'character.' Therefore, the instruction that absolutely precluded the jury from considering any sympathy for Robyn Parks improperly undermined the jury's ability to consider fully petitioner's mitigating evidence." *Id.* at 1556.

Examination of recent United States Supreme Court case law, however, indicates that the *Parks* court may have been influenced by the prosecution's attempt to assuage the jury's conscience, rather than the attempt to exclude extraneous sympathy *per se*.

> "An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issue at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors which, we think, would be far more

> likely to turn the jury against a capital defendant than for him." *California v. Brown* (1987), 479 U.S. 538, 543.

Similarly, Ohio law has consistently upheld prosecutorial comments, such as that found in the case *sub judice*. See, *e.g., State v. Greer* (1988), 39 Ohio St.3d 236.

Therefore, under the *Benner* doctrine, as trial counsel would not have prevailed on this issue had it been raised on direct appeal, no prejudice can be demonstrated by counsel's failure to so raise.

Petitioner's third subpart lacks merit.

Next, petitioner theorizes that trial counsel was ineffective because they failed to challenge the alleged "mandatory nature" of the Ohio capital sentencing scheme, which holds that death must be recommended if aggravation outweighs mitigation. It appears his challenge here is based on an obligation by counsel to assert the appropriate consitutional [sic] issues on appeal. Apparently, petitioner theorizes Ohio's death penalty plan is unconstitutional because it is mandatory in nature. We do not subscribe to this position. Ohio's capital punishment statutory sections do not contain a literal, mandatory death penalty concept. See, *Woodson v. North Carolina* (1976), 438 U.S. 280, by way of comparison. As this court noted, in *State v. Hill* (Nov. 27, 1989), Trumbull App. Nos. 3720/3745, unreported, at 62, courts have rejected identical challenges to the "mandatory nature" of the sentencing structure. See, *e.g., State v. Jenkins* (1984), 15 Ohio St.3d 164, at paragraph five of the syllabus; *State v. Buell* (1986), 22 Ohio St.3d 124. We also note in this regard that the United States Supreme Court in *Blystone v. Pennsylvania* (1990), 110 S.Ct. 1078, which case involved portions of the Pennsylvania death

penalty statute dealing with the mechanics of determining the appropriate application of capital punishment there, and which pertinent provisions are substantially similar to those obtaining in Ohio, held that such a statutory approach was not impermissibly "mandatory".

Petitioner's fourth subpart is without merit.

The fifth subpart to petitioner's third assignment contends that petitioner's trial counsel were ineffective because they failed to object to unadjudicated offenses which were contained in the pre-sentence investigation report and which were related to the jury. (Counsel did object to hearsay statements contained in the report, but did not address the unadjudicated offenses expressly).

In support of his motion, petitioner directs this court's attention to *State v. Hutton* (April 28, 1988), Cuyahoga App. No. 51704, unreported. In *Hutton*, the eighth district held:

> "In a capital case, it is impermissible to reveal to the jury the existence of offenses for which the defendant has not been convicted. *** The conduct of the state in revealing the appellant's criminal history with regard to charged offenses which did not result in convictions was impermissible and resulted in an unfair prejudice to the appellant." *Id.* at 64.

After rendering this analysis, *Hutton* applied the holding of *United States v. Hastings* (1983), 461 U.S. 499, which said that, to sustain a conviction under these circumstances, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury still would have found the defendant guilty. *Hutton, supra*, at 65. The Ohio Supreme Court, in its discussion of the hearsay issue in petitioner's direct appeal, appeared to utilize a similar analysis.

After examination of the guidelines for propounding a pre-sentence investigation (and after noting that these guidelines were minimal), the court stated:

> "While great latitude is ordinarily granted the probation department's investigating officers to include relevant material, it should be noted that here considerable portions of the statements at issue contained statements which are irrelevant to either mitigating or aggravating circumstances. The combined effect of these statements tended to undermine the impartiality of the presentence report and constituted error.
>
> It would have been better procedure to have stricken the statements from the report.
>
> The error in the report preparation was not, however, sufficiently grievous as to irrevocably taint the mitigation proceedings.***" *Glenn, supra*, at 459-460.

The court's rationale for determining that the hearsay error was harmless was that the aggravating circumstances in the case so outweighed the mitigating factors that it cannot be said that the included portions of the pre-sentence report affected the mitigation phase of the trial.

As a matter of jurisprudential analysis, this court agrees with the eighth district in *Hutton*. The disclosure of "other acts" types of activities, for which a defendant was not convicted, is fraught with potential problems of prejudicial error, as the cumulative effect of the unadjudicated offenses may well turn a jury against a defendant who ostensibly has no criminal record.

However, when applying the standard in *Hastings*, this court is obliged to find that the error in question was

harmless especially in light of a claim of ineffective assistance of counsel. As the Ohio Supreme Court noted, the disparity between the aggravating circumstances and the mitigating factors was, under the evidence presented, substantial. Consequently, it can be presumed that the jury would have found that the aggravating circumstances outweighed the mitigating factors even without the pre-sentence investigation's inclusion of the unadjudicated offenses. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. (This answer does not take into consideration how a jury would have reacted had the calculus of aggravating circumstances to mitigating factors been changed. This issue will be discussed in conjunction with petitioner's ninth assignment of error).

As petitioner would not have prevailed on this issue on direct review, this court finds this argument to be without merit, per *Benner, supra.*

Petitioner raises several other issues, under the rubric of the third assignment of error, including an alleged erroneous jury instruction on reasonable doubt during the penalty phase, the use of a dictionary by the jurors during the same time, and instructions on all seven mitigating factors even though petitioner did not raise all of them. However, as the state correctly maintains, these topics were not addressed at the post-conviction hearing.

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)" *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus.

The same principle holds true for an appellate court which is considering an appeal taken from a post-conviction proceeding. Consequently, this court finds that the final subparts of petitioner's third assignment of error are waived.

Petitioner's third assignment is without merit.

Petitioner's fourth assignment of error argues that the trial court erred in denying admission of petitioner's exhibit "O", which was the Summit County Psychodiagno [sic] clinic file, prepared during the mitigation evaluations. Petitioner attempted to introduce this file to demonstrate the paucity of materials possessed by the clinic during the time when that entity was engaged in the mitigation evaluations. Petitioner's contentions are predicated on Evid. R. 403, which states:

"***

"(B) Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

Petitioner argues that, since the evidence was relevant (defined as having any tendency to make the existence of a fact in issue more probable than it would otherwise have been, Evid. R. 401), the court erred in excluding the exhibit.

The trial court, as the state correctly notes, has a great deal of discretion in determining the exclusion of evidence, and an appeals court will not reverse absent a clear abuse of discretion by the trial court. *State v. Decker* (1986), 28 Ohio St.3d 137, 138; *State v. Apanovich* (1987), 33 Ohio St.3d 19. Examination of the record of the post-conviction hearing indicates to this court that the court did not abuse its

discretion.

The trial court heard testimony about the contents of the petitioner's exhibit "O" from Dr. Kathleen Stafford and Joseph Adkins. Adkins stated that the clinic had no information pertaining to petitioner's social history, medical records, or psychological records. The testimony of petitioner's three expert psychologists further corroborated petitioner's contention that the Summit County Psychodiagnostic Clinic file was devoid of many significant materials relating to the life of petitioner. The testimony on this subject unequivocally indicates that the object which petitioner claims was sought, mainly to show no such information was on file, was achieved through such evidential input. When viewed with all of this testimony, this court finds that the file itself was simply cumulative evidence and was therefore properly excludable under Evid. R. 403(B).

Petitioner's fourth assignment is without merit.

In petitioner's fifth assignment of error, he argues that the trial court erred in rejecting the psychological evidence adduced at the evidentiary hearing. The trial court, in its judgment entry, stated:

> "The Public Defenders Office offered opinions of psychologists and other medical persons which seems to criticize or question the validity of medical opinions relied on by McBroom and Breckenridge. These experts are not competent to judge or oppine [*sic*] the duty or responsibilities of attorneys and therefore the opinions are given little weight."

The state argues that the weight and credibility to be given to a witness is to be primarily determined by the trier

of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus. Consequently, it claims this court must defer to the trial court's perception of the witnesses' credibility and the value of their evidence.

Petitioner argues that the court erred because the judge misunderstood the purpose for which these witnesses were presented. The trial court concluded that these experts, the psychologists and other medical experts, were not competent to render opinions on the attorney's effectiveness or ineffectiveness. (This was correct). However, petitioner argues that they were not presented for this purpose, but were offered to opine on what the mitigation evaluation could have contained had counsel, through reasonable investigation, discovered this material and presented it to the Summit County Psychodiagnostic Clinic for preparation in rendering an evaluation for the mitigation hearing. In essence, the witnesses, which the trial court discounted, were offered to suggest an inference of ineffectiveness based upon this failure of trial counsel.

At this juncture, it should be noted that these witnesses were permitted to testify at the post-conviction hearing. The judge, though, in his journal entry, did not afford much weight to their evidential input. As noted by *DeHass, supra*, such is the prerogative of the trier of fact. Based upon this, no error can be found.

The fifth assignment of error is overruled.

As *United States, ex rel. Cross v. DeRobertis* (C.A. 7, 1987), 811 F.2d 1008, 1016, asserts, the testimony of experts is clearly admissible and useful for this purpose.

Petitioner's sixth assignment of error argues that the trial court erred in ruling that petitioner received a fair sentencing

trial. Petitioner's contention is that, given the state of the Summit County Psychodiagnostic Clinic's file, and the minimal information available to Drs. Siddall and Ramani at the time of the mitigation hearing, petitioner could not have possibly received a fair mitigation hearing. Further, petitioner argues, pursuant to *Ake v. Oklahoma* (1985), 470 U.S. 68, 83, that his mitigation hearing was unfair because the state failed to assure that the experts, working on the mitigation hearing, conducted an appropriate examination and evaluation.

Petitioner notes that Drs. Siddall and Ramani did not have, and consequently did not take into consideration, evidence of his social, medical or psychological history. He strenuously urges that, in order to perform an adequate analysis, the doctors would have had to have made some efforts to obtain these records. Instead, petitioner claims, they performed a cursory and minimal examination, followed by the production of similarly styled evaluations.

A capital defendant who requests a mental examination, like a pre-sentence investigation, exposes him/herself to the risk of potentially incriminating pre-sentence investigations, whether these revelations come in the pre-sentence report or in the mental health evaluation. *Buell, supra*, at 138. However, although the request for a pre-sentence investigation or a mental health examination may involve a hazardous judgment, such risks should not include the possibility that the evaluators will make little or no efforts to procure sufficient information to properly prepare the reports. The *Ake* case clearly requires the experts to conduct a competent and appropriate evaluation.

This court is, however, precluded from rendering a determination as to the appropriateness of Siddall and Ramani's evaluations, as petitioner failed to raise this issue

on direct appeal. Consequently, as the state correctly notes, this issue is *res judicata*. *Perry, supra*.

Petitioner's sixth assignment of error is, therefore, without merit.

In his seventh assignment of error, petitioner alleges that it was error for the trial court to permit the prosecutor of this case to give an expert opinion on the effectiveness of petitioner's trial counsel. Petitioner argues that former Mahoning County Prosecutor Vincent Gilmartin lacked the requisite knowledge and background to offer an expert opinion as to the effectiveness of a criminal defense counsel, an aspect of criminal practice in which he had never worked.

Petitioner's argument is uncognizable. A review of the record indicates that Gilmartin testified, not as an expert, but rather as an individual offering direct evidence of counsel's work effort. The observations that he related were simply those gleaned from work habits of petitioner's trial counsel throughout both the trial and mitigation phases, and were not directed to the professional effectiveness of that representation. The weight and credibility of Gilmartin's testimony was a matter to be determined by the trier of fact. Moreover, Evid. R. 701 allows for the introduction of opinion testimony by a lay witness, if such testimony is "rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue."

Petitioner's seventh assignment of error lacks merit.

Petitioner's eighth assignment of error is similar to the seventh. In this assignment, he challenges the admission of testimony by the state's expert, Thomas Zena, on the grounds that the basis of this testimony was Zena's own

assumptions and personal beliefs.

Petitioner's contention is that Zena's opinion was based solely on a subjective standard of effective counsel. This, petitioner argues, violates the *Strickland, supra*, requirement that effectiveness of counsel is to be measured against an objective standard.

The fallacy in petitioner's argument is that it presumes that Zena's subjective standards of what constituted good practice were the sole basis of his expert opinion. Instead, the record indicates that he based his opinion on his own extensive criminal practice background and exposure to the field (including in the capital arena); to his scholarly readings on capital trials; and on his review of the case. Clearly, an expert is going to base his/her conclusions on an understanding of what constitutes effective practice of law on observations taken from his/her own practice in the field. This firsthand knowledge, coupled with a grasp of the norms and the standards set forth by the profession, and his study of the record in this case, were the basis of Zena's testimony.

Petitioner's eighth assignment of error is without merit.

In petitioner's ninth assignment of error, he concludes that he received ineffective assistance of counsel at the mitigation phase of his capital trial. Petitioner's theory, simply put, is that trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." *Strickland, supra*, at 691. Petitioner argues that an examination of trial counsel's apparent decision not to investigate, even assessed for reasonableness under the totality of the facts and circumstances, and with a great deal of deference given to trial counsel's judgments, would reveal that counsel's

decision was unreasonable and, consequently, was ineffective as a matter of law.

The state sets forth a number of arguments in opposition to petitioner's contentions. As a preliminary matter, the state reminds this court of the Herculean task any petitioner undertakes when attempting to demonstrate ineffective assistance of counsel, most notably in the requirement that the petitioner show that "*** but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland, supra*, at 694. Further, the state notes that, under *Strickland*, the petitioner must demonstrate that the performance of his counsel fell below an acceptable standard *and* that he suffered prejudice thereby.

The state also presents several federal cases for this court's consideration, all of which upheld the effectiveness of counsel without adducement of medical testimony by the trial counsel at the mitigation hearing. The import of these cases as persuasive precedent is questionable, given *Strickland's* dictates that the determination of the effectiveness of representation should be done on a case-by-case basis, considering all of the facts and circumstances. Moreover, examination of these cases reveals that trial counsel, in the cases cited, based their decision not to present medical history on strategic considerations, either because the admission of harmful material which could raise problems on cross-examination *(Foster v. Dugger* (C.A. 11, 1987), 823 F.2d 402, 406; *Burger v. Kemp* (1987) 483 U.S. 776, 794) or for other "valid reasons." *Davis v. Kemp* (C.A. 11, 1987), 829 F.2d 1522, 1537).

The state analogizes the facts of the case *sub judice* to *Burger, supra*, where the court stated that the test of effective assistance of counsel is "whether counsel acted reasonably in deciding not to introduce the evidence out of

apprehension that it would contribute little to his client's chances of obtaining a life sentence while revealing possibly damaging details about his past and allowing forseeably devastating cross-examination." *Id.* at 789, fn. 7. The state argues that this strategy, outlined in *Burger*, was "clearly" the same strategic decision made by petitioner's trial counsel.

A close reading of the record reveals that, while this court agrees with the state's assessment of petitioner's trial counsel's strategy in some aspects, it cannot find the signposts which demonstrate the motivations the state asserts behind *all* of petitioner's trial counsel's decisions.

Counsel's decision not to place any of petitioner's family on the stand, for example, appears to be well documented by the record. On cross-examination, during the post-conviction hearing, all of petitioner's familial witnesses indicated that they had given affidavits to the state which contained potentially harmful information about the petitioner. Clearly, petitioner's mother's testimony, because of her own predilections, appears to have been excluded for purely tactical reasons. This is demonstrated by counsel's willingness to use petitioner's mother's unsworn statement, which was contained in the excluded videotape. Safe from the grasp of cross-examiners, counsel felt tactically secure in introducing petitioner's mother's testimony. Otherwise, they appeared to have opted not to introduce the testimony of family members.

The purpose behind not investigating and introducing medical evidence, relating to petitioner's organic brain disease and physical and mental ailments is, however, opaque to this court. The state offers no hypothesis as to how the adducement of such evidence, which might have substantiated R.C. 2929.04(B)(3)'s mitigating factor of a mental defect which caused the offender to lack capacity to appreciate the

criminality of his conduct or conform his conduct to the requirements of the law, could have led to possibly damaging details about petitioner's past. In fact, investigation into this area would have detailed not only petitioner's organic brain disorders, but also his social history of abuse and poverty, his school difficulties and psychological records. All of this evidence would have been useful in mitigation even though some aspects of this type of material might have been cumulative.

What is, in fact, clearly apparent to this court, after a close reading of the trial record, is that trial counsel attempted to put forward, at the mitigation hearing, a presentation which would appeal to the juror's religious and moral scruples against the death penalty. In so organizing this strategy, counsel chose to not pursue questions of physical health. Under normal circumstances, the decision to investigate or not is a strategic one, and will not be second guessed by this court. However, counsel apparently made little-to-no effort to obtain these medical records at all. Such a tactical decision is unreasonable, as it is based on insufficient investigation upon which to formulate strategy, under the *Strickland* analysis.

The state, however, argues that, even if this court were to find that petitioner's trial counsel's investigation was insufficient, this assignment of error still fails as petitioner cannot demonstrate prejudice. The state bases its argument on two contentions. The first is that, even if all of the mitigating evidence adduced by petitioner was accepted into evidence, he still could not mitigate the fact that he shot a peace officer in cold blood.

The philosophical underpinnings of this contention appear to be that the crime committed by petitioner is so heinous that it is impossible for the crime to be mitigated in

any way. While this court agrees that the murder of a peace officer, in cold blood, is an abhorrent crime and well worthy of strict punishment, it cannot adopt the state's position. The validity of this state's capital sentencing scheme rests on an individualized consideration of both aggravating circumstances, such as the murder of a peace officer, and possible mitigating factors, such as organic brain disease. To blithely assume that any killing which represents a statutory aggravating circumstance is such a predominant factor that no evidence of mitigating factors can outweigh it is to conclude that the mitigating factors portion of the Ohio sentencing scheme is essentially meaningless. Such a conclusion would render the Ohio capital sentencing scheme unconstitutional and would return this state to the days of *Furman v. Georgia* (1972), 408 U.S. 238. Clearly, there can be posited times when the mitigating factors will outweigh the aggravating circumstances. Such a calculus, however, must be done on a case-by-case basis, and by looking at all relevant evidence.

The state's second contention is that, although evidence adduced at the post-conviction hearing was certainly more extensive than that produced during the mitigation hearing, all of the points referred to during the post-conviction hearing were thematically related to those propounded at the mitigation hearing. The state's argument is, therefore, that the evidence presented at the post-conviction hearing was simply a more expansive explication of evidence produced at the mitigation hearing. This contention is only somewhat meritorious.

A scrutinized reading of the evidence presented during the mitigation hearing, by petitioner's trial counsel, demonstrates that a particularly attentive juror could have gleaned the following facts about the petitioner: he came from a poor background, in a less than average

socioeconomic neighborhood; he was a truant; he had problems in school; he came from a large family; there was no apparent father figure in his life; he became nervous under pressure; he was referred for testing as a result of his academic difficulties; and his intelligence was low. Consequently, the more comprehensive presentations of evidence on these subjects during the post-conviction hearing constituted merely a gloss on previously submitted evidence.

However, nowhere, even under the most expansive reading of this evidence, could the mitigation evidence presented be interpreted to also tell the jury that petitioner was globally brain impaired, as a probable result of his prenatal exposure to general anesthesia. Nor does it tell of the obvious physical signs of this brain damage: the rocking, the head banging, the hyperactivity, the bed wetting. Moreover, the jury was not informed of the physical abuse perpetrated on petitioner by his mother and its possible impact on petitioner's reactions under stress.

As petitioner's brief notes, trial counsel clearly had the time and the wherewithal to perform such an investigation. However, based upon *Strickland, supra*, we are required to determine "but for counsel's unprofessional errors, the results of the proceedings would have been different." *Id.* at 694.

Not only are we required to apply *Strickland*, but our review, based upon an appeal from a post-conviction relief exercise, is premised upon whether or not the trial court abused its discretion in denying the request for relief. In this cause, utilizing the standard enunciated in *Strickland* for ineffective assistance of counsel when viewed in an abuse of discretion context, we do not find error.

The trial court, sitting in the post-conviction exercise in

this case, had before it not only the evidence introduced at that proceeding, but also the entire record including the trial-in-chief and the mitigation phase. The main issue raised below focused upon the presentation of mitigation evidence regarding petitioner's's mental aptitude. He maintains that counsel was deficient as no evidence of his mental impediments, because of organic disorders, was presented at mitigation.

This conclusion is incorrect. The reports of Drs. Ramani and Siddall both contain statements reflecting petitioner's intelligence and emotional stability. To the contrary, Ramani's report noted that the "circumstances do not suggest that the crime was artfully planned and carried out. *** [and] that the offense was not the product of psychosis, mental retardation, organ brain disease, other mental illness, lack of education, unusual emotional pressure, or inadequate coping skills ***." Dr. Ramani concluded:

> "He was in good contact, with no evidence of acute or overt psychosis. He was well oriented X3. His judgement [*sic*] had been adequate to his life syle [*sic*], to the extent he worked in a body shop and was developing his boxing skills. He is somewhat retarded (reported I.Q. in 75 percentile). [*sic*] but this doesn't appear to be severe enough to impair his judgement [*sic*] or capacity to manage his day very well.
>
> "In summary, within reasonable medical certainty, I do not see any imtigating [*sic*] circumstances in this particualr [*sic*] individual."

At the post-conviction proceeding, petitioner presented two witnesses who speculated that these reports would have been different had the doctors been fully apprised of petitioner's mental problems. However, the record is devoid of any

showing that the two experts did not consider this type of evidence. Furthermore, the challenge that petitioner could not have executed this escape plan himself is not supported by the evidence submitted in this cause.

The evidence adduced at trial indicates that petitioner was the sole actor in carrying out the escape plan regardless of who formulated it. (One interpretation of the evidence suggests petitioner, when unable to procure the getaway vehicle as originally planned, altered this portion and obtained another car on his own). He purposefully rammed into the rear of the police vehicle in which his brother was riding. As the victim approached his automobile regarding the incident, he was shot in the chest. (Petitioner's brother was still in the sheriff's car). Additionally, petitioner understood the criminality of his actions as indicated by the report of Dr. Ramani.

In conclusion, it is apparent that the various tests administered to the petitioner's by Drs. Siddall and Ramani and evaluated by them, albeit not designed to expressly discover organic brain deficiencies, did not manifest such shortcomings in his reasoning processes that would have significantly impaired his ability to substantially appreciate the criminality of his actions or to conform his conduct to the requirements of the law.

With this in mind, we cannot find that the trial court abused its discretion in overruling the post-conviction relief proceeding, as it does not appear that but for counsel's failure, the results would have been different, with the jury concluding that the aggravating facts outweighed the mitigating circumstances.

Petitioner's ninth assignment of error is overruled.

In his final assignment of error, petitioner argues that the trial court's conduct and remarks at the evidentiary hearing denied him full, fair and reliable consideration of his claims for relief. A close reading of the record reveals this contention to be without merit. Nothing in the record demonstrates that the trial court did not act professionally and with competence. The few remarks excerpted by petitioner are taken out of context and, read in congruence with the remainder of the record, are not at all problematic.

As a result, the petitioner's final assignment of error is without merit.

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGE DONALD R. FORD

COX, J., sitting
by assignment,

BASINGER, J., sitting
by assignment,

concur.

STATE OF OHIO Filed: 6/21/89

COUNTY OF PORTAGE, ss IN THE COURT OF COMMON PLEAS

State of Ohio,
Plaintiff

vs. Case No.
JOHN GLENN, APPEAL NO.
Defendant

This matter came on for hearing upon a petition filed by John Glenn for post conviction remedies pursuant to R.C. 2953.21. The Petition being filed by the State Public Defenders Office on behalf of Defendant contains 10 causes of action raising issues that have been previously decided by the Supreme Court of Ohio and therefore are res judicata.

The court granted an evidentiary hearing to allow the defendant to offer evidence to establish ineffective representation by Attorneys McCroom and Breckenridge.

The public defender office sets forth what they feel the standards to be used to determine inneffective [*sic*] assistance of counsel. It is interesting to note neither the Supreme Court of Ohio or the United States Supreme Court agree with this interpretation.

A review of the evidence clearly shows that Attorneys McCroom and Breckenridge did investigate this matter not only as to the guilt or innocence of this defendant, but as to his family background, school records, medical and mental history and made informed judgments concerning evidence to be presented at a mitigation hearing.

The Public Defenders Office offered opinions of psychologists and other medical persons which seem to

criticize or question the validity of medical opinions relied upon by McCroom and Breckenridge. These experts are not competent to judge or oppine [sic] the duty or responsibilities of attorneys and therefore the opinions are given little weight.

It is therefore the conclusion of this judge that at the mitigation hearing and trial John Glenn was adequately represented by Counsel, that he received good representation and a fair trial and therefore the contention of the Public Defender is rejected.

The public defender then suggests Glenn was not properly represented on appeal, that they failed to raise issues. This is wholly without merit and is rejected by this Court.

Therefore, it is the finding of this Court the [*sic*] the petition for post conviction remedy is denied. Costs to be paid by petitioner.

George E. Martin, Judge
Portage County Common Pleas Court

TITLE I - HABEAS CORPUS REFORM

***

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended -

***

(3) by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.";

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that---

"(A) the claim relies on ---

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."; ***.

Supreme Court, U.S.
FILED
JUL 22 1996

(3) 95-1969

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ARTHUR TATE, JR., WARDEN,
Petitioner,

v.

JOHN GLENN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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6 pp

The Petition for Writ of Certiorari establishes 1) that the recent Antiterrorism and Effective Death Penalty Act is applicable to this pending case; 2) that the Act requires federal courts to apply a more deferential standard of review in habeas cases in reviewing mixed questions of law and fact decided by state courts; 3) that at a minimum the new standards require a remand (if not an outright reversal) of the lower court's decision, vacating a death penalty sentence imposed for the killing of a police officer; and 4) that these issues collectively warrant prompt review by the Court. Respondent offers several arguments in response, all unpersuasive.

A. The Amendments To 28 U.S.C. §2254 Apply To This Case.

Respondent first argues that the Amendments cannot apply to his case because the Sixth Circuit had issued its decision before the effective date of the Act. This is simply mistaken. Glenn's case was still pending when the Act became effective because certiorari was available to the State. Besides the Court's decision in *Felker v. Turpin*, ___ U.S. ___, 1996 U.S. LEXIS 4264 (June 28, 1996), which applied the new Amendments to a pending case, Respondent overlooks several other sources of authority indicating that a change in law applies to pending cases.

First, under 28 U.S.C. 1254,

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> > 1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,

> before or after rendition of judgment or decree; . . .

While review by appeal is obligatory, whereas review by certiorari is discretionary, the original understanding was that certiorari, if granted, conferred "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Act of March 3, 1891, 26 Stat 826, 828, C. 517, §6.[1] Thus, "[i]f a federal question is involved, the process of direct review 'includes the right to petition this Court for a writ of certiorari.'" *Williams v. Missouri*, 463 U.S. 1301 (1983)(quotation omitted). And in the context of applying rules of retroactivity in criminal cases, the Court has stated that direct appeal ends "when . . . the time for filing a petition for certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 953 (1994) (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)).

Second, Glenn's argument goes too far. It would foreclose review based on the new Amendments no matter how clearly Congress expressed its intent to apply new legislation retroactively. A petition for rehearing in this instance would be foreclosed, since one application had already been denied and a new application would be untimely. If review on certiorari were also foreclosed, the intent of Congress to apply the Amendments to pending cases would be foreclosed as well. In Justice Steven's words: "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens J., dissenting). Of course, in this instance, more

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[1] Subsequent amendments deleted such language as surplusage.

than mere error correction is at issue. The applicability of the new Act to pending cases is a substantial federal question.

B. Congress Intended to Apply the Amendments to Pending Cases.

Glenn next argues that the simultaneous provision by Congress of a specific retroactivity clause for death penalty procedures (Title I, §107 of the Act, now codified as 28 U.S.C. §§2261-2266) and the absence of a specific retroactivity clause for the non-death penalty Amendments (Title I, §101-106, as applicable here, 28 U.S. 2254) evidences congressional intent that the new deferential review standard is not applicable here. But *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994) is to the contrary. *Landgraf* establishes a rule of construction that procedural, as opposed to substantive, amendments to existing statutes are applicable to pending cases. Since 28 U.S.C. §§2261-2266 did not previously exist, Congress gave specific direction on retroactivity since the normal *Landgraf* rule would not be applicable. However, since 28 U.S.C. §2254 already existed, the *Landgraf* rule of retroactive application to procedural issues precluded the need for a specific reference to retroactivity.

C. The Amendments Do Not Impose "New Legal Consequences" To Events Completed Before Their Enactment.

Glenn then argues that *Landgraf* precludes retroactive application of the Amendments since the new law would attach new legal consequences to events completed before its

enactment. New 28 U.S.C. § 2254, however, is entirely procedural, merely providing the mechanism by which presumptively final state court judgments of conviction and sentences shall be reviewed by a federal court. In *Felker*, the Court noted, "our authority to grant habeas relief to state prisoners is limited to §2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State Court.'" ___ U.S. ___, 1996 U.S. LEXIS 4264 *19 (1996). There could be no legitimate expectation by Glenn at the time he committed the crime that he was entitled to de novo, rather than deferential, review. Again, *Felker* reaffirmed that the Court has continually "recognized that judgments about the proper scope of the writ are normally for Congress to make." ___ U.S. ___, 1996 U.S. LEXIS 4264 *23. That the Amendment significantly alters the existing standard of review, moreover, does not change the character of the Amendment from procedural to substantive. *Dobbert v. Florida*, 432 U.S. 289, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.").

Finally, Glenn's reliance on district court decisions that rendered contrary rulings on this question merely confirms the need for prompt review. While the cases cited by Glenn hold that the recent Amendments are not applicable to pending cases, other decisions are to the contrary. *See Mullins v. Saunders* No. 96-0016-R, (D. Va., W. D., June 14, 1996); *Burton v. Russell*, No. C-1-96-28, (D. Ohio, S. D., June 26, 1996), (copies lodged with clerk). In addition, and because of the growing split of authority on this question, lower courts appear to be rendering alternative holdings on the issue, thus "assuming, without deciding, that these provisions apply retroactively to cases pending when the law was passed. . . " . *Ayala v. Speckard*, No. 95-2463, 1996 U.S. App. LEXIS 17302 (2nd Cir., July 15, 1996). In

short, a ruling from this Court will settle the issue once and for all.

CONCLUSION

For the foregoing reasons, and those expressed in the Petition, the Court should grant certiorari, or in the alternative grant certiorari and remand the case for reconsideration in light of the recent amendments to 28 U.S.C. §2254.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ARTHUR TATE, JR., WARDEN,
Petitioner,

v.

JOHN GLENN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL ARGUMENT

This supplemental brief is submitted pursuant to Rule 15.8, Rules of this Court, to bring to the Court's attention cases, not available at the time of the initial petition, which establish a deepening division and uncertainty as to whether the standard-of-review amendments to 28 U.S.C. §2254 apply to pending cases.

Some lower courts have attempted to avoid reaching the merits of the issue. *See*: ***Bennett v. Angelone***, 1996 U.S. App. LEXIS 21003 * 7 (4th Cir., August 20, 1996) (determining relief would be denied under "pre-Act habeas law."); ***Remeta v. Singletary***, 85 F.3d 513 (11th Cir. 1996) (same); ***Dickerson v. Vaughn***, 90 F.3d 87, 90 (3rd Cir. 1996) (applying more deferential test of Act because "the resolution of the issues in this case would not differ under either version of the statute"). ***Ayala v. Speckard***, 89 F.3d 91 (2nd Cir. 1996) (same); ***Cockrun v. Johnson***, 1996 U.S. Dist. LEXIS 10828 (E.D. Tex., July 25, 1996) (deciding case under both pre- and post-Act version of statute);[1] ***Callins v. Johnson***, 89 F.3d 210 (5th Cir. 1996) (same).

Other lower courts have attempted to resolve the issue with mixed results. ***See Leavitt v. Arave***, 927 F. Supp. 394 (D. Idaho 1996) (amendments applicable to pending cases);

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[1] *See id.* at * 8 ("[I]t is also recognized that the courts that have addressed the issue of the AEDPA's effect on pending cases have not all reached the same conclusion as is reached in this case. Indeed it is difficult to find any point of agreement at all among the many recent decisions on this difficult and important question. In light of this uncertainty it would be imprudent to fail to consider the AEDPA altogether in the opinion. Thus, Cockrun's claims will be analyzed first under the pre-AEDPA law, and second, in the alternative, his claims will be evaluated under the AEDPA.")

United States of America ex rel. Slaughter v. Gilmore, 1996 U.S. Dist. LEXIS 11107 (N.D. Ill. E.D., July 25, 1996) (amendments not applicable); *Boria v. Keane*, 90 F.3d 36 (2nd Cir. 1996) (same). Most recently, the United States Court of Appeals for the Seventh Circuit heard argument *en banc* on this issue in *Aaron Lindh v. James P. Murphy*, No. 95-3608.

CONCLUSION

For the above reasons, as well as those set forth in the Petition, the Court should grant certiorari, or in the alternative remand the case for reconsideration in light of the recent amendments to 28 U.S.C. §2254.

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